ant in operating travelling cranes in connection with the work being performed in said arsenal by the defendant on or about December 22, 1952, the aforesaid Jeremiah C. Crowley, who was then rightfully upon the premises and engaged in the performance of his work of repairing windows, was struck by one of said cranes and severely injured, and as a result of said injuries he died.

6. The aforesaid Jeremiah C. Crowley left surviving him as sole heirs and next of kin, his wife, Kathleen F. Crowley, and two minor children, James Crowley and Paul Crowley, who were wholly dependent upon his earnings for support at the time of said injury and death. The said Kathleen F. Crowley is the duly qualified and acting administratrix of the estate of said deceased under appointment of the Probate Court for the County of Plymouth, Massachusetts. The plaintiff brings this action to enforce the liability of said defendant for said injury and death pursuant to the provisions of said General Laws, Chap. 152, Section 15, having paid compensation to and for the benefit of the aforesaid dependants of said deceased on account of his injury and death in accordance with the provisions of said Chapter 152.

Wherefore the plaintiff demands judgment for the sum of $200,000.00 and costs, together with reasonable attorneys fees.

DEFENDANT'S ANSWER

The defendant denies each and every allegation in the Complaint and says that:

1. The damages alleged by the plaintiff were caused in whole or in part by the negligence of Jeremiah C. Crowley otherwise known as Christopher Jeremiah Crowley, for whose injuries and death the plaintiff has brought this action.

2. The aforementioned Jeremiah C. Crowley was a trespasser upon the premises where the damages complained of occurred.

3. The aforementioned Jeremiah C. Crowley assumed the risk of incurring the injuries allegedly suffered.

4. The injuries alleged by the plaintiff were caused in whole or in part by the negligence of fellow servants of the aforementioned Jeremiah C. Crowley who were employees of the P. J. Spillane Company, and who were not employees of the United States Government.

MOTION TO JOIN KATHLEEN F. CROWLEY, ADMINISTRATRIX OF ESTATE OF JEREMIAH C. CROWLEY AS PARTY PLAINTIFF

The plaintiff, Massachusetts Bonding and Insurance Company, says that Kathleen F. Crowley of Abington, Plymouth County, Massachusetts, presently residing in Yarmouth, Nova Scotia, Canada, is the duly qualified and acting Administratrix of the Estate of Jeremiah C. Crowley, deceased, intestate, under appointment by the Probate Court for said Plymouth County, and, as such, she has an interest in this action brought by the plaintiff for the injuries to and death of said Jeremiah C. Crowley, as provided by General Laws Chapter 152 Section 15.

Wherefore the plaintiff moves that said Kathleen F. Crowley, Administratrix as aforesaid, be joined as party plaintiff in this action.

Excerpts From Transcript

* * * * * * *

[162] [Discussion off the record.]

Mr. SULLIVAN. I think, to save the Court's time, it might be appropriate for me to raise the question at this time. At some point the government will request the Court to rule as a matter of law that the ceiling on the Massachusetts statute is applicable to an action brought under the Federal Tort Claims Act and the government would like to be heard on that point.

The COURT. That, I assume, can be dealt with after [163] all the evidence is in.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 657

MASSACHUSETTS BONDING AND INSURANCE COMPANY AND KATHLEEN F. CROWLEY, ADMINISTRATRIX OF THE ESTATE OF JEREMIAH C. CROWLEY, PETITIONERS,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 1, 1956

CERTIORARI GRANTED MARCH 5, 1956

INDEX

DOCKET ENTRIES

UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

Civil Action No. 53-921-W

MASSACHUSETTS BONDING AND INSURANCE COMPANY, KATHLEEN F. CROWLEY, ADMX., OF ESTATE OF JEREMIAH C. CROWLEY AS PARTY, PLTF.

v.

UNITED STATES OF AMERICA

1953

Sept. 21. Complaint filed.

* * * * * * *

Nov. 17. Defendant's answer filed.

Dec. 1. Motion to join Kathleen F. Crowley, Administratrix of Estate of Jeremiah C. Crowley as party plaintiff, filed and assented to.

Dec. 21. Plaintiff's motion to amend complaint, assented to, filed.

1954

Jan. 21. Plaintiffs' motion for production of documents, papers and things for inspection, copying or photographing, filed.

Feb. 9. WYZANSKI, D. J. Hearing on plaintiff's motion for production of documents, papers and things for inspection, copying and photographing, motion allowed.

Feb. 18. Defendant's motion for production of documents, papers and things for inspection copying or photographing, filed.

Mar. 2. WYZANSKI, D. J. Hearing on defendant's motion for production of documents, papers and things for inspection, copying or photographing—motion denied.

Nov. 2. Interrogatroies by the plaintiff Kathleen F. Crowley Admx., etc., to the defendant filed.

Nov. 26. Request for entry of twenty day order under Rule 9 (4), filed.

Nov. 26. Twenty day order entered. Copies mailed Nov. 26, 1954.

Dec. 9. Defendant's answers to interrogatories by the plaintiff, filed.

1955

Jan. 25. Defendant's motion for summary judgment, filed.

Mar. 4. Affidavit of service, filed with affidavit of Michael J. Nigrelli attached thereto.

Mar. 7. WYZANSKI, D. J. Hearing on defendant's motion for summary judgment, motion denied.

Mar. 7. Defendant's memorandum in support of defendant's motion for summary judgment, filed.

* * * * * * *

Apr. 13. WYZANSKI, D. J. Court trial begins—stipulation No. 1, filed—evidence—defendant's oral motion for judgment filed at close of plaintiff's case—denied.

Apr. 14. WYZANSKI, D. J. Trial continues—evidence—request for rulings filed—advisement.

* * * * * * *

Apr. 14. Plaintiff's request for rulings, filed.

Apr. 14. Defendant's requests for conclusions of law, filed.

Apr. 14. Memorandum of agreement between counsel for plaintiffs and defendant, filed.

Apr. 18. WYZANSKI, D. J. Findings and Conclusions:—Judgment for the plaintiffs according to the conclusions stated.

* * * * * * *

June 20. WYZANSKI, D. J. Plaintiff's agreement for entry of judgment, filed and approved.

June 22. WYZANSKI, D. J. After trial without a jury and in accordance with the findings and conclusions of the Court dated April 18, 1955, and with the plaintiff's agree-

ment for entry of judgment approved June 20, 1955, Ordered judgment for the plaintiffs in the sum of $60,000.00 and order for distribution. Judgment entered.

Copies mailed 6/22/55.

June 24. Notice of appeal filed by the defendant.

* * * * * * *

COMPLAINT

The plaintiff complains of the defendant, United States of America and alleges as follows:

1. This is an action for money damages for personal injury and death caused by the negligence and wrongful acts and omissions of employees of the United States of America while acting within the scope of their employment, pursuant to Section 1346(b) of Title 28 U.S.C., and Chapter 171 of Title 28 of U.S.C.

2. The jurisdiction of this Court is based on the Federal Tort Claims Act, Sections 2671-2680 and Section 1346(b) of Title 28 U.S.C.

3. The plaintiff is a corporation duly organized under the laws of Massachusetts having its principal place of business in Boston, Massachusetts, which is within the District of Massachusetts and it brings this action for the conscious suffering and death of Jeremiah C. Crowley, otherwise known as Christopher Jeremiah Crowley, deceased, late of Abington, Massachusetts, under the provisions of General Laws, Chapter 152, Section 15, of the Commonwealth of Massachusetts.

4. On or about December 22, 1952, the defendant was engaged in operating a manufacturing estbalishment and arsenal known at the Watertown Arsenal in Watertown, Massachusetts and the aforesaid Jeremiah C. Crowley was working in said arsenal as an employee of a contractor engaged by the defendant to repair windows in said arsenal.

5. Because of the negligence of employees of the defend-

Mr. SULLIVAN. Certainly, your Honor. I didn't know just when you wanted to take that.

* * * * * * *

[198] The COURT. Now I understand that you want to make a point about the degree of potential recovery under this statute, the maximum that is permitted. Is there anything else you want to say at this time?

* * * * * * *

[199] [Discussion off the record.]

Mr. SULLIVAN. If your Honor please, I might direct my attention, first of all, to the damage point, since that point was raised earlier. * * *

* * * * * * *

[202] Thus the Government contends it is clear that a limit on the amount of damages is not incompatible with a measure of damages that is actual or compensatory as provided in Section 2674. If the ceiling were not imposed on recovery under the Federal Tort Claims Act in Massachusetts, a statute enacted to do away with an incongruity, it would create another incongruity because the whole theory behind the Federal Tort Claims Act is to give a plaintiff the same right against the Government under certain circumstances as he would have suing a private party.

* * * * * * *

[213] The COURT. Thank you, Mr. Sullivan.

* * * * * * *

Findings and Conclusions

April 18, 1955

WYZANSKI, D. J.

I find these to be the facts.

F-1. This is an action under the Federal Tort Claims Act, 28 U.S.C. c. 171. Complaint is made that employees of the government negligently caused the death of Jeremiah C.

Crowley on December 22, 1952 at the Watertown Arsenal. Plaintiffs are the administratrix of Crowley's estate and his employer's insurer who, having paid compensation to decedent's dependent, brings this action pursuant to a subrogation provision of the Massachusetts Workmen's Compensation Act. Mass. G.L., c. 152 § 15.

F-2. While the testimony was columinous the essential facts can be briefly stated, particularly since they resemble those which ordinarily are found by the general verdict of a jury.

F-3. P. J. Spillane entered into a contract with the Department of the Army of the United States to rehabilitate steel sash at the Watertown Arsenal. Spillane employed Crowley, an iron worker, aged 50, to help perform the contract.

F-4. The contract provided that "The work shall be done in regular working hours between 8:00 A.M. and 4:30 P.M. Mondays through Fridays with the following exceptions: The contractor will be required to work on Sundays in Bldgs. 41, 44 and 421, and on Saturdays or nights in Bldg. 45 as necessary to accomplish work adjacent to rails of overhead cranes, in order that there be no interference with production. Arrangement will be made thru Post Engineer at least 3 days in advance of any Saturday, Sunday or night work. All buildings to be worked on under this specification are in active use, and the contractor may expect occasional and intermittent delays when working near operating cranes. The contractor shall not be entitled to additional compensation for such occasional delay, or for overtime work as specified for Bldgs. 41, 44, 421 and 45".

F-5. On Monday, December 22, 1952, Spillane's men, including Crowley, having completed much of the contract, and having only one week's work left, were fixing window sashes on the South Wall of Building 41 adjacent to the overhead crane rails. Between 8 A.M. and 10 A.M. these men were observed at the middle of the rails and West of the middle point by various government employees regularly employed at the Arsenal. Among the observers were Barry, who was then foundry supervisor, and O'Brien and White, who were cranemen or crane operators.

F-6. While there is testimony that about 9 A.M. Nigrelli, one of Spillane's ironworkers told Barry that they would be through working on the rails in a short time, I do not believe that any definite assurance was given. Moreover, I doubt whether Barry told Nigrelli and Crowley that he was about to order White's crane to move over the rails in their direction.

F-7. At about 11 A.M. O'Brien left his crane parked on the rail at a point on the South Wall West of where Nigrelli and Crowley had been working and East of the crane operated by White. O'Brien had seen Spillane's men at numerous points on the rails earlier in the day, but he testified that he saw no one there when he left his crane. In my opinion, O'Brien did not look to see if men were there, or if he looked he has forgotten when he saw.

F-8. Since the O'Brien crane had no brake for keeping it firmly in position when parked, when O'Brien departed the crane was subject to motion toward Spillane's men if it were hit by White's crane.

F-9. At about 11 A.M. Barry directed White whose crane was the only one with appropriate electromagnetic equipment to proceed to put that equipment into operation and to move the crane along the rail on the South Wall in an Easterly direction picking up metal bars and the like from the floor. Barry testified that before giving this order he looked to see if any of Spillane's men were on the crane rails. I, however, do not believe he looked carefully. Barry testified that he told White to take with him a rigger. The rigger would have served as a look-out. White denies that he received such an order. At any rate he did not take a rigger.

F-10. White proceeded to move his crane in an Easterly direction on the rails at about 10 miles an hour. He gave no signal by flag or otherwise. His crane as it moved did not cause sufficient vibration to serve as an adequate warning to workmen on the rail. From his position in the cab of his crane White could not see any workmen who might be on the rail behind the parked O'Brien crane, for the O'Brien crane blocked the view. White did not seek or receive from any rigger or other person information as to whether the rail was clear behind O'Brien's crane.

F-11. White's crane hit O'Brien's parked crane and that in turn hit Crowley and caused him to fall to the floor. The blow or the fall caused Crowley's death.

F-12. The evidence does not justify a finding that prudent and reasonable ironworkers on the rails would have worn safety belts or like equipment, nor that they would have kept a lookout posted below, nor that they would have taken special precautions to avoid being hit by a moving crane.

F-13. Crowley, who was himself born December 10, 1902, left surviving him his wife Kathleen, born April 19, 1911, a son Paul, born May 11, 1946 and another son, James, born May 10, 1948.

F-14. As an iron worker, Crowley earned $6049.42 in 1951 and $6819.32 in 1952. He kept for himself about $1000 annually and used the balance for the benefit of his wife and children. Of that sum about one-fifth went for the benefit of each child and about three-fifths for the benefit of his wife. Had Crowley survived he would have an addiitonal working life of approximately 15 years. On the basis of mortality tables it was probable that all the members of the family would have survived at least until the end of the year 1967. Since Crowley's death, the rate of pay for ironworkers has increased, and seems likely to increase. Opportunities for employment at the type of ornamental iron work on which Crowley was chiefly employed continue ordinarily until a man is in his middle sixties, or even later. But there is no assurance of regularity of employment. The earnings over a 15 year period would probably have been under $100,000, and the wife and children would probably have received between $65,000 and $85,000, the benefits being received in installments in different years.

Upon the basis of the foregoing facts, these are my conclusions of law.

C-1. At the time of the accident Crowley was a business invitee fully entitled to be on the crane rail near the South Wall in the Easterly area of Building 41 of the Watertown Arsenal. The contract between Spillane and the United States did not prohibit the performance of work in this area during normal working hours; it merely provided that if the work could not be done during normal working hours

due to operations at the Arsenal, the contractor would have to do the work at other times without receiving overtime pay.

C-2. At the time of the accident Crowley was in the exercise of due care.

C-3. At the time of the accident Crowley had not voluntarily assumed any risks.

C-4. The cause of Crowley's death was exclusively attributable to the movement toward him of O'Brien's crane which was propelled by White's crane.

C-5. In moving his crane into contact with O'Brien's crane, without being able to see whether men were on the other side of O'Brien's crane, without having made any inspection of the crane rail before beginning the movement, and without receiving guidance from a rigger or lookout, White failed to exercise toward Crowley the care which would have been exercised by a reasonable and prudent man. White's failure constituted negligence toward Crowley. That negligence is attributable to his employer the United States.

C-6. Inasmuch as Crowley's death was caused by the negligent act of one of the government's employees, the United States is liable for compensatory damages to the widow and children of Crowley, 28 U.S.C. § 2674. The damages are measurable by the pecuniary injuries resulting to those next of kin from Crowley's death; and the damages are not limited by the minimum and maximum set forth in Mass. G.L. (Ter. Ed.) C.229 § 2c, as amended, commonly called the Massachusetts Death Statute.

C-7. The compensatory damages recoverable by Kathleen F. Crowley, the widow, are $37,500, by Paul Crowley are $11,250 and by James Crowley are $11,250. While Paul will reach maturity 14 years, 4 months, and 20 days after the death of his father, whereas James will reach maturity more than 15 years after his father's death, no distinction should be made between the brothers as it is probable that in the last years of minority neither child would have received from his father many pecuniary advantages. Moreover, it is probable that in those years the wife would have received more.

C-8. It having been stipulated that Massachusetts Bonding and Insurance Company paid compensation for the death of Crowley, it is entitled to bring this suit.

C-9. It having been stipulated that Mrs. Crowley is a duly qualified administratrix of Crowley's estate, she is entitled to sue on behalf of herself and Crowley's and her children as Crowley's next of kin.

C-10. If the plaintiffs cannot agree on the distribution of the recovery, application may be made to the Court for further findings and conclusions.

Judgment for plaintiffs according to the conclusions stated.

(S.) *Charles E. Wyzanski, Jr.,*
United States District Judge.

WYZANSKI, D. J. After trial without jury and in accordance with the findings and conclusions of the Court dated April 18, 1955 and with the plaintiffs' agreement for entry of judgment approved June 20, 1955, it is

ORDERED that the plaintiffs, Massachusetts Bonding and Insurance Company and Kathleen F. Crowley, Administratrix, recover from the defendant, the United States of America the sum of Sixty Thousand Dollars ($60,000.00) with costs taxed at $..... to be distributed as follows:

1. To John R. Kewer, attorney for the plaintiffs, an attorney's fee of $12,000.00 plus any disbursements in connection with this action including any appeal proceedings.

2. The balance shall be divided between the Massachusetts Bonding and Insurance Company and Kathleen F. Crowley, Administratrix in accordance with the provisions of Massachusetts General Laws C 152, s. 15, as amended, and any orders of the Massachusetts Industrial Accident Board issued thereunder.

3. The amount received by Kathleen F. Crowley, Administratrix is to be for the use and benefit of Kathleen F. Crowley, individually, and her children, Paul Crowley and James Crowley, in the following proportions:

62.5% to Kathleen F. Crowley
18.75% to Paul Crowley
18.75% to James Crowley

By The Court:

(S.) Grace V. Flood,
Deputy Clerk.

June 22, 1955.

(S.) Wyzanski,
United States District Judge.

Judgment entered June 22, 1955; John A. Canavan, Clerk.

By (S.) Grace V. Flood,
Deputy Clerk.

On October 4, 1955, this cause came on to be heard and was fully heard by the Court, Honorable Calvert Magruder, Chief Judge, and Honorable Peter Woodbury and Honorable John P. Hartigan, Circuit Judges, sitting.

Thereafter, on October 31, 1955, the following opinion of the Court was filed:

United States Court of Appeals
For the First Circuit

No. 5024.

UNITED STATES OF AMERICA,
DEFENDANT, APPELLANT,

v.

MASSACHUSETTS BONDING AND INSURANCE COMPANY ET AL.,
PLAINTIFFS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Before MAGRUDER, *Chief Judge,* and WOODBURY and HARTIGAN, *Circuit Judges.*

Benjamin Forman, Attorney, with whom *Warren E. Burger*, Assistant Attorney General, *Anthony Julian*, United States Attorney, and *Paul A. Sweeney*, Attorney, were on brief, for appellant.

John R. Kewer, with whom *John M. Hogan* was on brief, for appellees.

OPINION OF THE COURT.

October 31, 1955.

MAGRUDER, *Chief Judge.* A complaint under the Federal Tort Claims Act was filed in the United States District Court for the District of Massachusetts, seeking recovery against the United States of money damages on account of the death of Jeremiah C. Crowley. The death was caused by the alleged negligent operation of traveling cranes by various government employees at the Watertown Arsenal, Watertown, Mass., while acting within the scope of their employment.

The plaintiffs named in the complaint, as amended, were

the administratrix of the estate of Jeremiah C. Crowley, suing on behalf of the statutory next of kin pursuant to the Massachusetts Death Act, and the insurer of Crowley's employer who, having paid compensation to the decedent's dependents, was empowered to sue the tortfeasor under a subrogation provision of the Massachusetts Workmen's Compensation Act. Mass. G. L. (Ter. ed.) C. 152, § 15.

After trial, the district court made findings and conclusions to the effect that under the facts disclosed the United States was liable for compensatory damages on account of Crowley's death, and that the resulting pecuniary injuries to Crowley's widow and children, who were his statutory next of kin, amounted to the aggregate sum of $60,000. These findings as to the liability of the United States and the amount of pecuniary injury to the next of kin are not now challenged on this appeal. But the district court went on to rule, as a matter of law, that the compensatory damages to be paid by the United States were not subject to the limitation upon recovery specified in the Massachusetts Death Act. Accordingly, judgment was entered against the United States in the amount of $60,000, from which judgment this appeal has been taken, presenting to us the sole question whether the damages in this case recoverable against the United States may exceed the statutory maximum of $20,000 contained in the Massachusetts Death Act.

We are called upon to interpret and apply the provisions of the Federal Tort Claims Act, to ascertain the "intention of Congress," as the saying goes, in a matter with respect to which, unfortunately, the Congress has not expressed its intention with the clarity and precision which might be desired.

The Federal Tort Claims Act was first enacted in 1946 (60 Stat. 842). The key section was § 410(a), reading as follows:

"Subject to the provisions of this [Act], the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, . . . sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claim for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this [Act], the United States shall be liable in respect of such claims to the same claimants, in the same manner, *and to the same extent as a private individual under like circumstances,* except that the United States shall not be liable for interest prior to judgment, or for punitive damages. . . . [Italics added.]

Thus the section did not amount to the creation of a new comprehensive code of federal tort liability. Its purpose was not "the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence." *Feres* v. *United States*, 340 U. S. 135, 141 (1950). The liability so accepted on behalf of the United States has been referred to as a liability on principles of "respondeat superior." *National Mfg. Co.* v. *United States*, 210 F.2d 263, 278 (C.A. 8th, 1954). Ordinarily this means that the employer has to respond in damages where some employee, acting within the scope of his employment, has subjected himself to a

tort liability under the applicable local law. However, there may be exceptional cases in which the employee who committed the wrongful act has a personal immunity from any tort liability to the particular plaintiff, yet where, under the local law, his employer, if a private person, may have to respond in damages to the injured individual. See *Schubert* v. *Schubert Wagon Co.*, 249 N.Y. 253, 164 N.E. 42 (1928); *O'Connor* v. *Benson Coal Co.*, 301 Mass. 145, 16 N.E.2d 636 (1938); Am. L. Inst., Rest. of Agency § 217(2). No doubt, under such circumstances, there might be a liability against the United States under the Tort Claims Act, though the injured person was disabled from recovering any damages against the wrongdoing employee. See *United States* v. *Hull*, 195 F.2d 64, 68 (C.A. 1st, 1952).

Under the original statutory scheme of § 410(a), as set forth above, we think it is accurate to say that the United States could never be liable for a greater amount than that for which its wrongdoing employee would be liable under the local law, except in the one situation, just noted, where the injured individual could recover nothing from the employee only because the latter had a personal immunity from such tort liability.

As we pointed out in *United States* v. *Hull*, supra at 67, the waiver of sovereign immunity under the Tort Claims Act is not unlimited; the Congress has not thrown the door wide open to suits against the United States in tort in all cases where the United States, if it were a private individual, would be liable in like circumstances under the applicable local law. See also the exceptions specifically listed in § 421 of the original act (60 Stat. 845-46), now found in 28 U.S.C. § 2680.

So, too, under § 410(a) of the original act, the United States, if liable at all, was liable "to the same claimants, in the same manner, *and to the same extent*" [italics added] as a private employer under like circumstances;

yet this generalization was subject to the qualification or exception "that the United States shall not be liable for interest prior to judgment, or for punitive damages." Thus, even though under the statutory law of some states a private defendant in a tort action might be liable for interest, from the date the action was instituted, on the amount of damages ultimately determined (see *Moore-McCormack Lines, Inc.* v. *Amirault*, 202 F.2d 893 (C.A. 1st, 1953)), nevertheless the Congress has stipulated that the United States shall not be liable in such cases "for interest prior to judgment." Likewise, though under the law of some states a private employer, particularly a corporate employer, might be liable for punitive damages where the wrongdoing employee, because of the flagrant character of his wrong, might be subject to liability for punitive as well as compensatory damages (see 61 Harv. L. Rev. 119-21 (1947)), yet the Congress chose to prescribe in § 410(a) that the United States shall not be liable for "punitive damages."

It was brought to the attention of the Congress that this flat prohibition against the recovery of "punitive damages" produced the unintended effect of precluding all liability of the United States for wrongful death in two states of the Union. The Death Acts of Alabama and Massachusetts, departing from the Lord Campbell's Act prototype, provided or had been construed to provide that, in suits for death by wrongful act, the amount of liability of the defendant should be assessed, not with reference to the amount of pecuniary loss suffered by the next of kin, but rather on a punitive basis with reference to the degree of culpability of the wrongdoer.

The Congress was understandably unwilling on this account to repeal outright the provision of law forbidding the assessment of punitive damages against the United States. But the Congress did not merely make an amend-

ment to the effect that such prohibition against punitive damages should not apply to suits against the United States under the Death Act of any state which provided, as against a private employer, for the amount of liability to be assessed purely on a punitive basis. If it had done the latter, the Congress would have preserved the symmetry of the Act by permitting recovery against the United States only to the extent permitted by the local law as against a private employer. Instead, on August 1, 1947, the Congress added the following proviso to the language of § 410(a) above quoted (61 Stat. 722):

> "*Provided, however,* That in any case wherein death was caused, where the law of the place where the act or omission complained of occurred, provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons, respectively, for whose benefit the action was brought, in lieu thereof. . . ."

In the process of enactment of the foregoing amendment, the committee reports in both the House and Senate, after pointing out that under the scheme of the Federal Tort Claims Act each case is determined "in accordance with the law of the State where the death occurred," made the following comment:

> "This bill simply amends the Federal Tort Claims Act so that it shall grant to the people of two States the right of action already granted to the people of the other 46.
>
> This bill, with the committee amendment, will not authorize the infliction of punitive damages against the Government, and as so amended, it is reported favorably by a unanimous vote.
>
> Its passage will remove an unjust discrimination

never intended, but which works a complete denial of remedy for wrongful homicide." (H.R. Rep. No. 748, Committee on the Judiciary, 80th Cong., 1st Sess.; Sen. Rep. No. 763, Committee on the Judiciary, 80th Cong., 1st Sess.)

The substantive provisions of § 410(a), as thus amended, have since been split up and reenacted in separate sections of Title 28, U.S. Code, as follows:

"§ 1346. United States as defendant.

. . .

(b) Subject to the provisions of chapter 171 of this title, the district courts, . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

. . ."

"§ 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries

resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

Under the provisions of the Federal Tort Claims Act as they now appear in Title 28 of the Code, it is still true that Congress has not enacted a new comprehensive code of federal tort liability. It is still true that the Act in general calls for an application of the law of the state where the wrongful act or omission occurred. Also, the generalization is still in the law that the United States is to be held liable in tort "in the same manner and to the same extent as a private individual under like circumstances." The exceptional situation covered by the second paragraph of 28 U.S.C. § 2674 applies only to two of the 48 states, for in 46 of the states recovery under their respective Death Acts rests upon a compensatory basis. In about a dozen of these 46 states, the local Death Act contains some maximum limit on the amount of recovery. See Note, 26 Ind. L. J. 428, 440 n. 40 (1951). In these states, as the plaintiffs are bound to concede, the United States could not be liable for more than the statutory maximum permitted by state law in suits against private employers. Such is the clear mandate of the first paragraph of 28 U.S.C. § 2674.

As a matter of fact, the Congress and its committees were mistaken in supposing, when the 1947 amendment was enacted, that the Massachusetts Death Act at that time provided for the imposition of damages solely on a punitive basis. Such for many years had been so, but on June 7, 1947, the legislature had amended the statute so as to provide solely for compensatory damages of not less than two thousand nor more than fifteen thousand dollars, "to be assessed with reference to the pecuniary loss sustained by the parties entitled to benefit hereunder." Mass. Acts 1947, C. 506, § 1A. If the local Death Act had remained

in this form, then the 1947 amendment of § 410(a) of the Federal Tort Claims Act (now the second paragraph of 28 U.S.C. § 2674) would have had no application; and clearly the United States could not have been held liable for more than the statutory maximum which, under the local Death Act, could have been assessed against a private employer. However, the Massachusetts legislature soon changed its statute again, and when the tortious act occurred in the present case, and at all times thereafter, the local Death Act contained the following terms (Mass. G. L. (Ter. ed.) C. 229, § 2C, as amended):

> "§ 2C. Damages for Death by Negligence, etc.; General Provisions. . . . a person who by his negligence or by his wilful, wanton or reckless act, or by the negligence or wilful, wanton or reckless act of his agents or servants while engaged in his business, causes the death of a person in the exercise of due care, who is not in his employment or service, shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability or of that of his agents or servants, to be recovered in an action of tort, . . . to be distributed as provided in section one."

Therefore, the plaintiffs were quite right in contending that the second paragraph of 28 U.S.C. § 2674 applied to the case at bar.

As suggested above, the 1947 amendment to the Tort Claims Act did make a partial break in the original pattern of the Act in that, wherever the amendment was applicable, it became possible (1) that the United States might be held liable for a greater sum of damages, assessed on a compensatory basis, than might be assessed under the local Death Act against a private employer in cases in which the wrongdoer was deemed to have been guilty of the mini-

mum degree of culpability, and (2) the United States might be liable for no substantial damages at all, where the plaintiff failed to prove any pecuniary injury to the next of kin, as was the case in *Heath* v. *United States*, 85 F. Supp. 196 (D.C.N.D.Ala. 1949), though under the local Death Act a private employer might be subject to large damages assessed on a punitive basis. Thus in either of these situations the United States would not be liable "to the same extent" as a private employer under like circumstances, which is the generally applicable standard in the first paragraph of 28 U.S.C. § 2674.

But we think it is unnecessary to construe the 1947 congressional amendment, which was intended to remove what was deemed to be a discrimination in a very narrow situation, so as to effectuate a far greater discrimination and incongruity. If the contention of the plaintiffs were accepted, then in Massachusetts alone, of all the states whose respective Death Acts contain a maximum limit of recovery, the United States may be held liable in an amount in excess of the maximum limit of recovery permitted against a private employer.*

The plaintiffs would have us read literally, and in isolation, the language of the second paragraph of 28 U.S.C. § 2674 that, in lieu of punitive damages, "the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought." It is argued that since the damages, so computed, have been found to be $60,000, and since the Congress has imposed no maximum limit of recovery, then

* This is so because in Alabama, though damages under its Death Act are assessed on a punitive basis, there is no maximum limit on the amount of recovery. See *Heath* v. *United States*, 85 F. Supp. 196 (D.C.N.D.Ala. 1949). In all the other states whose acts contain a maximum limit, the damages are assessed upon a compensatory basis, so the second paragraph of 28 U.S.C. § 2674 is inapplicable.

necessarily, by the very command of the Congress, the judgment against the United States here must be in the sum of $60,000.

The trouble with the foregoing argument is that the Federal Tort Claims Act, as amended, must be read as an organic whole. In 1947, when the Congress enacted the amendment, it demonstrated no objection to that portion of the Massachusetts Death Act which contained a maximum limit of recovery. That was purely a matter of local legislative policy, and if a private employer could not be held for more than $20,000, then the Congress, in waiving the governmental immunity of the United States, had no reason to impose a liability upon the United States in excess of the maximum limit applicable to a private employer. What the Congress did not want was to have damages assessed against the United States on a punitive basis. We give full effect to the language of the congressional amendment if we assess damages against the United States on a compensatory basis measured by the pecuniary injuries resulting to the next of kin. Having done that, and if the amount so computed is in excess of $20,000, it is in no way inconsistent to cut down the larger sum to $20,000, the maximum amount recoverable under the terms of the Massachusetts Death Act. All of the $20,000 to be recovered in such a case would be compensatory damages—not one cent of it would be punitive damages—and thus there would be achieved the congressional objective of preventing the infliction of punitive damages against the United States. In other words, except where Congress has clearly provided otherwise, it is the general scheme of the Tort Claims Act to refer questions of liability of the United States to the provisions of "the law of the place where the act or omission occurred." Thus we must look to the local law to see who is entitled to sue, and for whose benefit; we must look to the local law on whether contributory negli-

gence of the decedent, or a release by him during his lifetime, bars the action for wrongful death; and we must also apply the provision of the local law as to the maximum amount of recovery, for in none of these particulars is there any inconsistent provision in the federal Act.

The judgment of the District Court is vacated and the case is remanded to the District Court for further proceedings not inconsistent with this opinion.

On the same day, October 31, 1955, this following judgment was entered:

JUDGMENT

October 31, 1955.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the case is remanded to that Court for further proceedings not inconsistent with the opinion passed down this day; appellant recovers costs on appeal.

By the Court:

/s/ Roger A. Stinchfield

Clerk.

Thereafter, on November 30, 1955, within time duly enlarged by the Court, appellees filed a petition for rehearing.

Thereafter, on December 15, 1955, the following opinion of the Court on petition for rehearing was filed:

United States Court of Appeals
For the First Circuit

No. 5024.

UNITED STATES OF AMERICA,
DEFENDANT, APPELLANT,

v.

MASSACHUSETTS BONDING AND INSURANCE COMPANY ET AL.,
PLAINTIFFS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

(*Warren E. Burger*, Assistant Attorney General, *Paul A. Sweeney* and *Benjamin Forman*, Attorneys, and *Anthony Julian*, United States Attorney, for appellant.)

Edward A. Crane, *John R. Kewer*, *John M. Hogan*, *Russell Coffin*, *Dale Vincent* and *Jules Angoff* for appellees on petition for rehearing and brief in support thereof.

OPINION OF THE COURT
ON PETITION FOR REHEARING.

December 15, 1955.

MAGRUDER, *Chief Judge*. We have given thought to an earnest petition for rehearing in which appellees urge certain further considerations in the hope that they will persuade us to alter the conclusion we arrived at in our opinion handed down October 31, 1955. Appellees are realistic enough not to overstate their arguments to the extent of suggesting that our previous conclusion was inescapably and palpably in error in respect to the proper

interpretation to be ascribed to the regrettably cloudy phraseology of the 1947 amendment to the Federal Tort Claims Act. In our opinion we stated that we were called upon "to ascertain the 'intention of Congress,' as the saying goes, in a matter with respect to which, unfortunately, the Congress has not expressed its intention with the clarity and precision which might be desired." We pointed out that, both under the original terms of the Act and under the Act as amended, it was the basic scheme of the Federal Tort Claims Act not to enact a new comprehensive code of tort liability of the United States, but merely to withdraw the defense of sovereign immunity and to permit a recovery against the United States "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," the United States to be held liable, in general, "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. §§ 1346(b), 2674. All we did was to reach a conclusion consistent with that basic pattern of the Act, in so far as the Act contained no explicit command to the contrary.

Suppose this accident had taken place in Illinois and suit had been brought against the United States based upon the Illinois Death Act, providing: ". . . and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person . . . not exceeding $20,000 . . . ." Ill. Rev. Stat. 1953, C. 70, § 2. It would be conceded there that though the next of kin might be found to have suffered pecuniary damages to the extent of $60,000, nevertheless the United States could not be held for more than $20,000. Similar maximum limits of recovery are specified in the statutes of about a dozen states

whose Death Acts predicate liability upon a compensatory basis, and if any other of the 46 states whose Death Acts are similarly based should in the future insert a maximum monetary limit on recovery, then automatically the United States, if otherwise liable under the Federal Tort Claims Act, would be liable only up to the stipulated maximum. The policy of placing such a maximum limit upon recovery may be open to question, but the wisdom of such policy is for the local legislatures. Obviously the Congress did not concern itself with that. It was content that the United States should be subject to liability only to the top limit of recovery permitted by the local law as against a private employer under like circumstances. See *United States* v. *Union Trust Co.*, 221 F.2d 62, 80 (C.A. D.C. 1955), *aff'd on other grounds* U.S. , 24 U.S.L. WEEK 3155 (Dec. 5, 1955).

It taxes our credulity to suppose that Congress, in enacting the 1947 amendment to permit recovery in Massachusetts and Alabama while assuring that damages against the United States under their acts should not be assessed on a punitive basis, intended thereby to compel the result that, in Massachusetts alone of all the states whose respective Death Acts contain a maximum limit of recovery, the United States might be held liable in an amount in excess of the maximum limit of recovery permitted against a private employer. In our original opinion we showed how full effect could be given to the purpose of the 1947 amendment, without at the same time reaching this surely unintended result.

We are well aware how far the peculiar terms of the Massachusetts Death Act depart from the conception of the original Lord Campbell's Act, 9 & 10 Vict. C. 93. In Massachusetts, without regard to whether the next of kin suffered any pecuniary loss, and if they did, without regard to the extent thereof, a person who by his wrongful act,

or by the wrongful act of his agents or servants while engaged in his business, causes the death of a person is subject to liability for "damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability or of that of his agents or servants, to be recovered in an action of tort." The Supreme Judicial Court has recognized that the damages are thus to be assessed on a punitive basis, though the act may also serve a compensatory purpose in that the money is to be paid to the next of kin who, to the extent that they in fact suffered some pecuniary damages, are thereby recompensed in whole or in part for such loss. See *Macchiaroli* v. *Howell*, 294 Mass. 144, 146-47 (1936); *Sullivan* v. *Hustis*, 237 Mass. 441 (1921).

Appellees are quite inaccurate in their assertion that there is no maximum on the recovery for wrongful death in Massachusetts. This is belied by the very terms of the Massachusetts Death Act. What appellees evidently have in mind is quite a different thing, namely, that where two (or more) wrongdoers concur in proximately causing a single death, the personal representative of the decedent has a statutory cause of action against each individual wrongdoer which may proceed to judgment and satisfaction without reference to the other, and collection of the judgment against one wrongdoer does not extinguish *pro tanto* the liability of the other. This is because the statutory purpose was to impose punishment upon each wrongdoer on the basis of the degree of his personal culpability. See *Porter* v. *Sorell*, 280 Mass. 457 (1932). As the court further explained in *Arnold* v. *Jacobs*, 316 Mass. 81, 84 (1944): "The statute, following a pattern familiar in criminal and penal provisions, limits the penalty that can be imposed upon one person for causing one death. It does not limit the amount that can be collected from a

number of wrongdoers for one death. Logically, as in the criminal law, each wrongdoer may be made to suffer the maximum penalty, no matter how many are guilty."

But it is to be noted that if the two negligent actors whose concurring negligence causes a single death are each at the time acting in the scope of their employment for a common employer, then presumably the common employer could be liable only to a single maximum of $20,000, for, by the very terms of the Massachusetts Death Act, "a person who by his negligence . . . or by the negligence . . . of his agents or servants . . . causes the death of a person . . . shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability or of that of his agents or servants . . . ." In other words, "a person," a single employer, who by the concurring negligence of no matter how many of his servants has caused the death of a person, is subject to but a single action of tort by the personal representative of the decedent, in which the maximum limit of recovery is $20,000.*

Though the facts of the present case do not present the situation, we shall allude briefly to the possibility that a single culpable act might cause the death of two or more persons. Since the Massachusetts act is expressed in the

*This point is not presented for decision in the present case. Though the complaint charged negligent acts on the part of several government employees at the Watertown Arsenal, the findings of the district court pinned liability on the United States only on the basis of the wrongful acts of a single employee. Of course it would be a matter of local law what the maximum recovery could be against a private employer when the concurring negligence of two or more of his servants causes a death. If the Massachusetts courts, contrary to what seems to be the effect of the state act, should hold that a private employer in such a case might be liable to a maximum of $20,000 for each servant of his guilty of actionable negligence, the only result would be, on our theory, that the same maximum limit would be applicable to the liability of the United States under like circumstances.

singular, imposing a tort liability of from two to twenty thousand dollars whenever the wrongful act of "a person" causes the death of "a person," it seems that the personal representative of each decedent has a wholly separate and independent cause of action against the wrongdoer, or his employer, for recovery of damages up to a maximum of $20,000. We take it that that is what was meant by the Supreme Judicial Court when it said, in *Arnold* v. *Jacobs*, 316 Mass. 81, 84 (1944), that the Massachusetts Death Act "limits the penalty that can be imposed upon one person for causing one death." In such a case, if several separate suits were brought against the United States, each suit would have to be disposed of as we think the case at bar must be disposed of—that is, the court would have to assess the pecuniary damages suffered by the next of kin of each decedent; where such damages are less than $20,000, the lesser amount so assessed is all that the particular plaintiff can recover from the United States; but where such damages are in excess of $20,000 the amount of recovery by the particular plaintiff must be scaled down to the statutory maximum of $20,000.

Appellees argue that when Congress in 1947 rejected the Massachusetts method of assessing damages on a penal basis, "it necessarily also rejected the limitations of minimum and maximum imposed solely under penal concepts. If it should be said that the Amendment has rejected the minimum, then how can we reasonably say that the maximum is not likewise rejected?" We agree that the 1947 amendment has rejected the $2,000 minimum in the Massachusetts act, for if the death of a person entailed no economic loss to the next of kin, then to hold the United States liable for the $2,000 minimum would be imposing to that extent a purely punitive liability, which the Congress has expressly forbidden. 28 U.S.C. §2674. But it does not follow that the maximum recovery permitted

by the Massachusetts act should also be disregarded when the total pecuniary damages to the next of kin may be in excess of that amount. Appellees ask: "Can it be said that if Massachusetts had a *purely compensatory death statute* at the time of the accident that it would necessarily have included in such statute the same maximum limit of recovery as had been established as a punishment? Is this assumption not at best conjectural and in fact unlikely?" It can be answered that that is exactly what the Massachusetts legislature did, during the brief period in which its Death Act assessed damages on a compensatory basis. Compare Mass. Acts 1947, C. 506, § 1A, with Mass. Acts 1949, C. 427, § 3. Furthermore, the important thing is that Massachusetts chose to impose a maximum limit upon the liability of a private employer in a wrongful death case, not why it chose to do so.

It is suggested by appellees that we ignored "the vitally applicable aspects of government employee morale referred to in *United States* v. *Gilman*, 347 U. S. 507." In the *Gilman* case the Supreme Court held that the United States, having been held liable under the Federal Tort Claims Act, could not maintain an action for indemnity against the negligent government employee; in the absence of a command from the Congress in that respect, the Court thought it should not adopt and apply in favor of the United States, as a federal decisional rule, the common law rule that an employer held liable on the doctrine of *respondeat superior* for the tort of a servant is entitled to collect indemnity from the servant whose breach of duty to the employer cast that liability upon him. In the Supreme Court opinion reference is made to the improvement in employee morale which was expected to result from an enactment that would offer a liability of the United States for the torts of its agents or servants, with a provision that a judgment against the United

States under the Act would thereby extinguish the private tort liability of the government employee to the victim. No doubt such contribution to governmental employee morale was contemplated by the sponsors of the legislation as an incidental by-product. But the emphasis in the committee reports is on the elimination of the recognized inequity of governmental immunity in this field and on saving the Congress from the burden of processing so many private bills for relief.

At any rate, the Federal Tort Claims Act does not undertake to relieve the anxiety of the wrongdoing employees by directly extinguishing whatever causes of action may have been created by local law against such employees. Presumably Congress could not constitutionally do this. What it did do, in effect, was to offer to the injured person an alternative remedy against the United States, subject to the condition that, if the plaintiff should choose to pursue that remedy to judgment against the United States, he would thereby relinquish his claim against the employee. But the plaintiff remains free to pursue the employee rather than the United States; and in some cases he might find it expedient to do so, where the employee is able to respond in damages or is adequately insured, instead of suing the United States in a federal district court sitting without a jury. So far as concerns the peculiar situation in Massachusetts with reference to wrongful death, it might well be preferable for the plaintiff to sue the employee, with the possibility of recovering $20,000 on a punitive basis, rather than to sue the United States, against whom he might recover nothing, if he was unable to prove any pecuniary damages. See *Heath* v. *United States*, 85 F. Supp. 196 (D.C.N.D.Ala. 1949). And in the situation where a death has been caused by the concurring wrongful acts of several employees of the United States, it might be expedient for the plaintiff to

pursue his separate actions of tort against each of the wrongdoers, for under *Porter* v. *Sorell*, 280 Mass. 457 (1932), he would have the possibility of recovering and collecting in the aggregate a maximum of $20,000 from each wrongdoer, whereas if he enforced his single action of tort against the United States as the common employer he would recover only such damages as he might prove of a pecuniary nature, which in any event could not exceed the maximum of a single $20,000 judgment.

On the whole, we do not perceive that either the holding or the language in *United States* v. *Gilman*, 347 U. S. 507 (1954), has much bearing on the case at bar.

Some point is made by appellees based on the assumption that the Federal Tort Claims Act as now interpreted "allows an employee to interplead the United States as a party defendant in a State Court action," citing *United States* v. *Yellow Cab Co.*, 340 U. S. 543 (1951). We are not sure that we understand the point appellees are trying to make in this connection; but in any event the assumption upon which the argument is based is wholly mistaken. *United States* v. *Yellow Cab Co.*, supra, did not decide that the government employee sued in a state court action could "interplead" the United States as a defendant therein. This could not be, because under the Federal Tort Claims Act the United States has consented to be sued only in a federal court, without a jury. In *United States* v. *Yellow Cab Co.*, the legal representative of a decedent had brought suit in a federal court against the Yellow Cab Co. for damages attributable to a death which may have been caused by the concurrent wrongful acts of a servant of the cab company and of an employee of the United States. The Supreme Court held that the waiver of governmental immunity was broad enough to permit the Yellow Cab Co. to implead the United States as a defendant in that action in the federal court, to enforce

whatever right to contribution the company might have had under the local law against the United States as a joint tortfeasor. But though *United States v. Gilman*, supra, has held that the United States, after being subjected to liability under the Federal Tort Claims Act, cannot sue its negligent employee for indemnification, it certainly does not follow that the government employee, if sued in the federal court in a diversity case, could implead the United States and insist that the United States as his employer must indemnify him from the consequences of his own wrongful act.

Finally, appellees argue that the interpretation which we have put upon the Federal Tort Claims Act, as amended, presupposes that the Congress attempted in the 1947 amendment to reject the entire Massachusetts Death Act "with the sole exception of the maximum because that alone is favorable to the United States." Of course the Congress did not attempt to reject the whole of the Massachusetts Death Act. In fact it is only by virtue of the Massachusetts Death Act that the United States may be liable at all for a wrongful death in Massachusetts. If the Massachusetts legislature should repeal its whole act, the United States would be under no liability, since the United States, if a private person, would not then be "liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). As we said in our original opinion: "Thus we must look to the local law to see who is entitled to sue, and for whose benefit; we must look to the local law on whether contributory negligence of the decedent, or a release by him during his lifetime, bars the action for wrongful death; and we must also apply the provision of the local law as to the maximum amount of recovery, for in none of these particulars is there any inconsistent provision in the federal Act."

After full reconsideration of the case, in the light of the petition for rehearing, we are satisfied that our original disposition was correct.

The petition for rehearing is denied.

On the same day, December 15, 1955, the following order of Court was entered:

ORDER OF COURT

December 15, 1955.

It is ordered that the petition for rehearing, filed November 30, 1955, be, and the same hereby is, denied.

By the Court:

(s) ROGER A. STINCHFIELD
Clerk.

Thereafter, on December 23, 1955, mandate was stayed until further order of Court.

CLERK'S CERTIFICATE.

I, Roger A. Stinchfield, Clerk of the United States Court of Appeals for the First Circuit, certify that the foregoing pages numbered 1 to 37 inclusive, contain and are a true copy of the record appendix to brief for appellant and proceedings to and including December 23, 1955, in the cause in said Court numbered and entitled 5024, United States of America, defendant, appellant, versus Massachusetts Bonding and Insurance Company et al., plaintiffs, appellees.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Court of Appeals for the First Circuit, at Boston, Massachusetts, in said First Circuit, this twenty-seventh day of December, A. D. 1955.

(s) ROGER A. STINCHFIELD
Clerk.

[SEAL]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 5, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In the
Supreme Court of the United States

OCTOBER TERM 1955

No. 653/

MASSACHUSETTS BONDING AND INSURANCE COMPANY AND KATHLEEN F. CROWLEY, ADMINISTRATRIX OF ESTATE OF JEREMIAH C. CROWLEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STANLEY H. RUDMAN
11 Beacon Street
Boston, Massachusetts
Attorney for the petitioners

JOHN R. KEWER
JOHN M. HOGAN
EDWARD A. CRANE
60 State Street
Boston, Massachusetts
of Counsel

SUBJECT INDEX.

CITATIONS

In the
Supreme Court of the United States

OCTOBER TERM 1955

No.

MASSACHUSETTS BONDING AND INSURANCE COMPANY AND KATHLEEN F. CROWLEY, ADMINISTRATRIX OF ESTATE OF JEREMIAH C. CROWLEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable, the Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:-

This is a petition by Massachusetts Bonding and Insurance Company and Kathleen F. Crowley, Ad-

ministratrix of the Estate of Jeremiah C. Crowley, for a writ of certiorari to review a judgment and opinion of the United States Circuit Court of Appeals for the First Circuit rendered in this case on October 31, 1955. Your petitioners' petition for rehearing was denied on December 15, 1955. The opinions of the Circuit Court on the appeal and on the petition for rehearing are included in the Record Pages 13-24, 27-37. These opinions have not as yet been printed in the reports.

Jurisdiction

The judgment of the Circuit Court of Appeals now sought to be reviewed was dated and entered October 31, 1955 (R.p. 24). The order denying your petitioners' petition for rehearing was dated and entered December 15, 1955 (R.p. 37). On December 23, 1955 the said Circuit Court ordered the mandate stayed until further order of the Court to permit filing of this application for a writ of certiorari (R.p. 37). This Court has jurisdiction to review this judgment by writ of certiorari under the provisions of 28 U.S.C. Sec. 1254.

Questions

The sole question is whether or not the actual or compensatory damages recoverable against the United States under the Federal Tort Claims Act, as amended, for a wrongful death caused by an employee of the United States in Massachusetts are limited to $20,000., the maximum amount of punitive damages recoverable under the Massachusetts punitive death statute from a private employer for a wrongful death under like circumstances.

Statutes Involved

28 U.S.C. Sec. 1346 (b) provides as follows:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. Sec. 2674 as amended, provides as follows:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively,

for whose benefit the action was brought, in lieu thereof.

Mass. G.L. (Ter. Ed.) C.229 Sec. 2C, as amended, provides as follows:

> Except as provided in sections one, two and two A, a person who by his negligence or by his wilful, wanton or reckless act, or by the negligence or wilful, wanton or reckless act of his agents or servants while engaged in his business, causes the death of a person in the exercise of due care, who is not in his employment or service, shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability or of that of his agents or servants, to be recovered in an action of tort, commenced, except as provided by sections four and ten of chapter two hundred and sixty, within two years after the injury which caused the death by the executor or administrator of the deceased, to be distributed as provided in section one.

Statement of the Case

This is an action against the United States under the Federal Tort Claims Act, 28 U.S.C. Secs. 2671-2680, brought in the United States District Court for the District of Massachusetts to recover money damages for the wrongful death of Jeremiah C. Crowley, which occurred at the Watertown Arsenal, Wafertown, Massachusetts, December 22, 1952. The action was commenced by the Massachusetts Bonding and Insurance Company, insurer of the deceased's employer under the Massachusetts Workmen's Compensation Laws, and subsequently the plaintiff, Kathleen F. Crowley, Administratrix of the estate of the deceased,

joined in the action as party plaintiff. Jurisdiction was conferred upon the United States District Court by 28 U.S.C. Sec. 1346 (b). After trial, the District Court (Wyzanski, D. J.) found and ruled that Crowley's death was caused by the negligent act of a government employee, that the United States was liable for compensatory damages measured by the pecuniary injuries to Crowley's widow and children pursuant to the provisions of the second paragraph of 28 U.S.C. Sec. 2674, that such damages totaled $60,000. and that the damages so determined are not limited by the maximum and minimum figures set forth in the Massachusetts Death Statute, Mass. G.L. (Ter. Ed.) C. 229, Sec. 2C (R.p. 10). Judgment was entered in favor of the plaintiffs for $60,000. damages in accordance with these findings and rulings (R.p. 11) and the United States appealed to the Circuit Court of Appeals. The findings of the District Court as to liability and the amount of pecuniary injuries were not challenged by this appeal and the sole question presented was whether or not the damages recoverable against the United States in this case may exceed the statutory maximum of $20,000. contained in the Massachusetts Death Statute (R.p. 14). The Circuit Court of Appeals has decided that while the Massachusetts Death Statute is purely punitive and the damages recoverable for wrongful death against the United States must be measured by the pecuniary injuries to those for whose benefit the action is brought under the terms of the second paragraph of 28 U.S.C. Sec. 2674, as amended, when such compensatory damages exceed the amount of punitive damages that can be assessed under the Massachusetts Death Statute against a private employer for a wrongful death under like circumstances they must be cut down to that amount.

Argument

I. This Case Presents an Important Aspect of the Extent of the Liability of the United States under the Tort Claims Act, which Has Not and Should Be Settled by this Court.

This is the first action against the United States for a wrongful death which raises the question here presented. The District and Circuit Courts agree that the Massachusetts Death Statute is punitive in nature, and that the 1947 amendment to the Tort Claims Act,[1] now contained in the second paragraph of 28 U.S.C. Sec. 2674, must be applied in this case to determine the way damages are to be measured. The point in issue is whether the Courts should give full effect to the plain language of that paragraph as written, or, by the process of judicial interpretation, make the determination that the Congress intended to limit the amount of compensatory damages measured by pecuniary loss to the maximum recoverable under local punitive death legislation for wrongful death under like circumstances.

At the present time only Massachusetts has a punitive death statute of general application which places minimum and maximum limits on the recovery. Hence, the questioned decision of the Circuit Court creates a binding precedent for the disposition of all cases which are likely to arise in the foreseeable future.[2] It is obvious that this

---

[1] C. 446, 80th Cong., 1st Sess., approved August 1, 1947 (61 Stat. 722). Under the revision of the Judicial Code the new provisions inserted by this amendment become the second paragraph of 28 U.S.C. Sec. 2674 (62 Stat. 869, 992).

[2] Alabama has a punitive death statute of general application but there are no minimum or maximum limits on the amount of recovery. See *Heath* v. *United States*, 85 F. Supp. 196 (D.C.N.D. Ala. 1949). Punitive death statutes, applicable only to deaths caused by railroads

is a matter of importance to the dependents of all persons losing their lives through actionable misconduct of government employees in Massachusetts. In addition, this decision establishes an important precedent for the use of the process of judicial interpretation to limit the liability of the United States under the Tort Claims Act in a manner not required by the terms of that Act.

II. The Decision of the Circuit Court of Appeals Is Based upon a Policy of Statutory Interpretation which Is in Direct Conflict with that Adopted by this Court for the Interpretation of the Tort Claims Act in *Indian Towing Co.* v. *United States*, 350 U.S. 61.

The Circuit Court of Appeals agrees with your petitioners that read literally, and in isolation, the language of the second paragraph of 28 U.S.C. Sec. 2674 requires the award of full compensatory damages in the case at bar (R.p. 22). However, the Court concludes that when read as a whole, the Tort Claims Act, as amended, does not express with sufficient clarity the intentions of Congress with respect to the matter now in issue, and it becomes the duty of the Court "to ascertain the intention of Congress" by the usual methods (R.pp. 14 and 28). The Court, therefore, considers the results of a literal interpretation of the per-

---

and other carriers, are in effect in Colorado, Missouri and New Mexico. 1935 Colorado Stats. c. 50, Sec. 1, as amended by Laws 1951, p. 338, Sec. 1 (damages between $3000 and $10,000). 1941 New Mexico Stats. Anno. 24-104, as amended by 1947 Laws, c. 125, Sec. 1 (damages fixed at $10,000). 1949 Missouri Rev. Stats. 537.070 (damages between $2000 and $10,000). Hence, it is possible for claims for wrongful death to arise from government operation of railroads in those states which would raise the question presented in this case.

Of the 46 states with compensatory death statutes of general application only about a dozen place some maximum limit on the amount of the recovery (R. p. 20).

tinent language and finds that what it calls an incongruity and discrimination which the Congress could not have intended, in that the United States may be required to pay greater damages than can be imposed upon a private employer in Massachusetts alone of all the States which limit the recovery for wrongful death (R.p. 22). To remove this incongruity, and what it believes unintended consequence of giving effect to the language of the act as written, it rules that the maximum limit of Massachusetts Death Statute constitutes the ceiling for compensatory damages recoverable from the United States for wrongful death.

Such intrusion by the Courts by judicial interpretation to modify or curtail the liabilities assumed by the United States in the Tort Claims Act was condemned in the recent case of *Indian Towing Co.* v. *United States*, decided November 21, 1955, 350 U.S. 61. In answer to the government's argument for an interpretation of the Act which would exclude liability for negligence in maintenance of a lighthouse because state agencies incur no such liability when performing similar functions, this Court states, at page 68: "The language of the statute does not support the government's argument." Thus, the principle of giving full effect to the language of the Act and of construing liberally the grant of remedies therein contained was reaffirmed. See *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 555.

Your petitioners submit that the Circuit Court decision in the instant case is based on a policy of statutory interpretation which is directly contrary to that so recently reaffirmed by this Court in the *Indian Towing Co.* case. In fact, the reasons given by the Circuit Court for its decision are those of the dissenting minority in that case.

In the *Indian Towing Co.* case, the minority of this Court, finding no private individuals engaged in providing lighthouse or similar public services, would restrict the rights

of recovery to those which the state law allows against the agencies which do perform such functions, in order to carry out the supposed intention of Congress that the United States should not be subjected to greater liability than to that imposed by state law in comparable situations. In the instant case, the Circuit Court, finding no equivalent liability of an individual for compensatory damage for wrongful death under Massachusetts law, would restrict the rights of recovery to those which the state law allows by way of punitive damages in order to carry out the same Congressional intent. Both of these opinions renounce and condemn a literal interpretation of the pertinent language of the Act which would subject the United States to greater liability.

The majority of this Court, by the *Indian Towing Co.* decision, refused to recognize any such paramount legislative intent which controls the interpretation of the plain language of the Tort Claims Act. The ruling of this Court that the language pertinent to the facts in that case must be given its plain meaning is equally applicable, to the present case. When it thus refused to permit a departure from the express language of the Act to limit the liability of the United States in a manner which considerations of justice and expediency might require it decided the fundamental issue of the present case in favor of your petitioners' contentions.

III. The Circuit Court's Interpretation of the Provisions of the Tort Claims Act Is Unwarranted and Contrary to the Express Provisions of the Act.

Your petitioners dispute the statement of the Circuit Court that there is any "regrettably cloudy phraseology of the 1947 amendment to the Tort Claims Act" which requires the resort to extrinsic matters for its interpretation (R.p. 28). Your petitioners also deny the logic of the Circuit Court's argument that because Congress adopts all provisions of the punitive death statute other than those dealing with the way damages are to be measured it is warranted in concluding that Congress intended to adopt the maximum limitation on punitive damages as the ceiling for the substituted compensatory damages. On the contrary, your petitioners maintain that the language used in this amendment is clear and unambiguous, and when read in context with the original Tort Claims Act there can be no reasonable doubt of the legislative intent to grant the right to full compensatory damages measured by pecuniary loss, independently of, and without reference to, the penalties imposed by the local law on private employers under like circumstances.

A. The 1947 amendment clearly expresses the legislative intent to allow full compensatory damages in lieu of punitive damages in the actions for wrongful death to which it applies.

The plain purpose of the 1947 amendment is to provide for the recovery of compensatory damages for wrongful death caused by employees of the United States in places where the death statutes are wholly punitive in nature. In order to do this and still retain the principle that the United

States should be subjected to liability only when a private individual would be liable, this amendment was enacted which accepts liability under the state death statute in all respects up to the point of assessment of damages, and then provides that the carefully defined federal rule for figuring compensatory damages shall be applied in lieu of any state rules for fixing punitive damages.

It is apparent that Congress recognized that all actions for wrongful death are based upon statutes which set forth the conditions for imposition of liability, identify the persons who may sue and for whose benefit suit may be brought, and prescribe the way damages are to be assessed. Accordingly, the objectives of this amendment were achieved by merely substituting the compensatory for the punitive measure of damages, retaining all the other elements of the state statute relating to liability. Thus it was made certain that the United States would be called upon to pay compensatory damages only when an individual would be required to pay punitive damages under the state law. By the addition of the words "in lieu thereof" at the end of this provision Congress also made certain that the compensatory damages defined therein were in full substitution for the rejected punitive damages. If the penal limit on such damages is now superimposed upon this compensatory measure of damage the latter can no longer be said to be truly compensatory.

B. The literal interpretation of the 1947 amendment does not result in any unwarranted or unintended discrimination.

It is entirely consistent and logical for Congress to respect state policy in limiting compensatory damages for wrongful death, as it has in the Tort Claims Act, by providing that the United States shall be liable only to the

same extent as private individuals, and, at the same time, allow the recovery of full compensatory damages when no such policy is present. Massachusetts has no policy, one way or the other, with respect to this matter of limiting compensatory damages for wrongful death. It allows recovery in its courts of full compensatory damages in wrongful death actions created by the laws of another state, even though that other state will not permit its courts to enforce the Massachusetts Death Statute because of its punitive nature. *Jackson* v. *Anthony*, 282 Mass. 540, 546-547 (1933). *McGrath* v. *Tobin*, *R.I.* , 103A 2d 795 (1954).

Consequently, there is no justification for the charge that discrimination results from following the language of the 1947 amendment and subjecting the United States to liability for full compensatory damages on wrongful death claims arising in Massachusetts, thus putting Massachusetts in the same class as all other states which do have a policy of limiting compensatory damages for wrongful death. In fact, the discrimination would be against Massachusetts claimants if Massachusetts were classified with those states having such a policy, for none of those states guarantee a minimum recovery once liability for wrongful death is established. The assurance given by the Massachusetts Death Statute of a $2,000. award without any proof of damage is a valuable right which tends to compensate for the maximum limitation on the possible recovery. There being no such compensating advantage from a limited compensatory death statute, Massachusetts claimants are prejudiced by being classified with those states having such statutes.

C. There is no justification for retaining the maximum and rejecting the minimum limitation on punitive damages contained in the Massachusetts Death Statute.

The Massachusetts Death Statute provides for the assessment of punitive damages in the sum of not less than $2,000. or more than $20,000. against a private employer based on the degree of culpability of the negligent employees involved. The Circuit Court agrees that the minimum limitation of $2,000. cannot be applied against the United States because of the prohibition against punitive damages (R.p. 32). Yet it holds that it is not inconsistent to apply the maximum of $20,000. When Congress rejected the punitive measure of damage did it not necessarily reject both the minimum and maximum limitations on such damage? Such limitations are an integral part of the Massachusetts statutory scheme for supplementing the criminal laws dealing with homicide with punitive death actions imposing penalties that are relinquished by the state to the surviving next of kin. "Like all punitive legislation the death statutes prescribe the extent of the punishment." *Porter* v. *Sorell*, 280 Mass. 457, 461. It must be presumed that the Congress knew punitive death statutes generally follow this pattern.

The sole purpose of the amendment which inserted the provision in question was to grant the right and define the remedy for wrongful death. To hold that the clear grant therein contained of the right to full compensatory damages for wrongful death was unintentional, imputes to Congress an inconceivable carelessness in draftmanship. Furthermore, when existing United States statutes, such as the Federal Employers Liability Act (45 U.S.C. Secs. 51-59), allow the recovery of full compensatory damages for wrongful death in places such as Massachusetts, how can it be said that conformity with state policies of allow-

ing only limited damages, punitive or compensatory, requires such a strained construction of this Act. Under all the circumstances it would seem more appropriate to let Congress further amend this Act if the results of the plain meaning of the language it used to define the remedy for wrongful death in places allowing only a punitive recovery were not intended.

Conclusion

Compensatory damages can never be equated to punitive damages. It appears that the Congress was well aware of this fact when it chose to substitute a federal rule for compensatory damages measured by pecuniary loss for the punitive damages recoverable for wrongful death under local death statutes. The Circuit Court would do what the Congress could have done but failed to do, that is, place a limit on those damages equal to the maximum punitive liability on private individuals under like circumstances. Your petitioners contend that such judicial interpretation of this important provision of the Tort Claims Act is improper, particularly in the light of the principles and policies established by this Court for the interpretation of this Act.

For the reasons herein set forth your petitioners respectfully submit that a writ of certiorari should be granted in this case.

STANLEY H. RUDMAN
Attorney for the petitioners
11 Beacon Street
Boston, Massachusetts

JOHN R. KEWER
JOHN M. HOGAN
EDWARD A. CRANE
60 State Street
Boston, Massachusetts
of Counsel

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 31.

MASSACHUSETTS BONDING AND INSURANCE COMPANY AND KATHLEEN F. CROWLEY, ADMINISTRATRIX OF THE ESTATE OF JEREMIAH C. CROWLEY,

PETITIONERS,

v.

UNITED STATES OF AMERICA.

BRIEF FOR PETITIONERS

JOHN R. KEWER
60 State Street
Boston, Massachusetts
Attorney for Petitioners

Of Counsel:
JOHN M. HOGAN
EDWARD A. CRANE
60 State Street
Boston, Massachusetts

SUBJECT INDEX

Citations

Cases:

Statutes:

Miscellaneous:

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 31.

MASSACHUSETTS BONDING AND INSURANCE COMPANY AND KATHLEEN F. CROWLEY, ADMINISTRATRIX OF THE ESTATE OF JEREMIAH C. CROWLEY,

PETITIONERS,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The judgment of the District Court for the District of Massachusetts in favor of the plaintiffs and assessing damages in the sum of $60,000 was entered without an opinion (R. 11). The opinions of the Circuit Court of Appeals for the First Circuit on the defendant's appeal from this judgment and on the plaintiffs' petition for rehearing are reported at 227 Fed.2d 385.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on October 31, 1955 (R. 24). The plaintiffs' petition for rehearing was denied on December 15, 1955 (R. 37). The petition for writ of certiorari was filed on February 1, 1956 and was granted on March 5, 1956 (R. 38). The jurisdiction of this Court rests on 28 U.S.C. 1254.

Question Presented

Whether the actual or compensatory damages recoverable from the United States under the Federal Tort Claims Act, as amended, for a wrongful death caused by an employee of the United States in Massachusetts are limited to $20,000., the maximum amount of punitive damages recoverable under the Massachusetts punitive death statute from a private employer for a wrongful death under like circumstances.

Statutes Involved

The relevant provisions of the Federal Tort Claims Act, as amended, are as follows:

28 U.S.C. Sec. 1346(b):

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of prop-

erty, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. Sec. 2674, as amended:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

The relevant provisions of the Massachusetts Death Statutes are as follows:

Mass. General Laws (Ter. Ed.) C. 229, Sec. 2C, as amended by Acts of 1951, C. 250:

Except as provided in sections one, two and two A, a person who by his negligence or by his wilful, wanton or reckless act, or by the negligence or wilful, wanton or reckless act of his agents or servants while engaged in his business, causes the death of a person

in the exercise of due care, who is not in his employment or service, shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability or of that of his agents or servants, to be recovered in an action of tort, commenced, except as provided by sections four and ten of chapter two hundred and sixty, within two years after the injury which caused the death by the executor or administrator of the deceased, to be distributed as provided in section one.

Mass. General Laws (Ter. Ed.) C. 229, Sec. 1, as amended by Acts of 1949, C. 427, Sec. 1:

If the life of a person is lost by reason of a defect or a want of repair of or a want of a sufficient railing in or upon a way, causeway or bridge, the county, city, town or person by law obliged to repair the same shall, if it or he had previous reasonable notice of the defect or want of repair or want of railing, be liable in damages not exceeding one thousand dollars, to be assessed with reference to the degree of culpability of the defendant and recovered in an action of tort commenced within two years after the injury causing the death by the executor or administrator of the deceased person, to the use of the following persons and in the following shares:—

(1) If the deceased shall have been survived by a wife or husband and no children or issue surviving, then to the use of such surviving spouse.

(2) If the deceased shall have been survived by a wife or husband and by one child or by the issue of one deceased child, then one half to the use of such surviving spouse and one half to the use of such child or his issue by right of representation.

(3) If the deceased shall have been survived by a wife or husband and by more than one child surviving either in person or by issue, then one third to the use of such surviving spouse and two thirds to the use of such surviving children or their issue by right of representation.

(4) If there is no surviving wife or husband, then to the use of the next of kin.

Statement of the Case

This is an action against the United States under the Federal Tort Claims Act, as amended, 28 U.S.C. Secs. 2671-2680, brought in the United States District Court for the District of Massachusetts to recover money damages for the wrongful death of Jeremiah C. Crowley, which occurred at the Watertown Arsenal, Watertown, Massachusetts, December 22, 1952. The action was commenced by the Massachusetts Bonding and Insurance Company, insurer of the deceased's employer under the Massachusetts Workmen's Compensation Laws. Subsequently, the plaintiff, Kathleen F. Crowley, Administratrix of the estate of the deceased, joined in the action as party plaintiff. Jurisdiction was conferred upon the United States District Court by 28 U.S.C. Sec. 1346(b). After trial, the District Court (Wyzanski, D. J.) found and ruled that Crowley's death was caused by the negligent act of a government employee, that the United States was liable for compensatory damages measured by the pecuniary injuries to Crowley's widow and children pursuant to the provisions of the second paragraph of 28 U.S.C. Sec. 2674, that such damages totaled $60,000. and that the damages in this case are not limited by the maximum and minimum figures set forth in the Massachusetts Death Statute, Mass. G.L. (Ter. Ed.) C. 229, Sec. 2C (R. 10). Judgment was entered in favor of the plaintiffs for $60,000. damages in accordance

with these findings and rulings (R. 11). The United States appealed to the Circuit Court of Appeals.

The findings of the District Court as to liability and the amount of pecuniary injuries were not challenged on appeal and the sole question presented was whether or not the damages recoverable against the United States in this case may exceed the statutory maximum of $20,000. contained in the Massachusetts Death Statute (R. 14). The Circuit Court of Appeals concurred with the District Court in holding that Massachusetts Death Statute is purely punitive and that the damage must be measured by the pecuniary injuries to those for whose benefit the action was brought under the terms of the second paragraph of 28 U.S.C. Sec. 2674, as amended. However, the Circuit Court ruled that when such compensatory damages exceed the maximum amount of punitive damages that can be assessed under the Massachusetts Death Statute against a private employer for a wrongful death under like circumstances they must be cut down to that amount (R. 23, 24).

Summary of Argument

Under the Tort Claims Act as originally enacted there could be no recovery against the United States for wrongful death caused by actionable misconduct of a Government employee in a state such as Massachusetts, which has a death statute providing for the recovery of punitive damages only, because of the prohibition against the award of punitive damages in actions against the United States. In 1947 Congress undertook to provide for reparation for such deaths by amending the Act to add the provision now contained in the second paragraph of U.S.C. Sec. 2674. This provision in most precise and clear language says that in such instances, "—the United States shall be liable for actual or compensatory damages, measured by the pecu-

niary injuries resulting from such death to the persons respectively, for whose benefit the action was brought—", in lieu of whatever punitive damages are prescribed by the local law. It is obvious that a literal construction of the provision added by this amendment requires the award of the full compensation damages as assessed by the District Court in this case. The plaintiffs further maintain, contrary to the opinion of the Circuit Court, that when viewed as a whole, this section, as amended, requires the same conclusion for the reasons set forth at length in this brief and which may be summarized as follows:

(1) The Congressional intent is clearly manifested to discard completely the rules for assessing punitive damages prescribed by the local death statute and to substitute therefor the rule for measurement of compensatory damages which Congress has written into the Tort Claims Act.

(2) The liability which the United States assumed by the 1947 amendment cannot be equated to the liability of a private individual under like circumstances because no private individual is under liability for the payment of compensatory damages for causing wrongful death in a place which allows the recovery of punitive damages only. By this amendment Congress authorizes a compensatory death action against the United States in places having punitive death acts, adopting the rules of the local punitive statute for determination of liability, who may sue and for whose benefit suit may be brought, but substituting a completely new set of rules for determining the damages. Thus, the United States becomes liable for a wrongful death caused by an employee only when a private individual under like circumstances would be liable, and to the same persons; but the damages assessed in consequence of such liability are those specified by the Congress in this enactment, in lieu of whatever damages of punitive nature a private

individual under like circumstances must pay. By the express mandate of Congress an exception is made to the general rule that the United States shall be liable "in the same manner and to the same extent" as a private individual; but the principle that the United States shall be liable only when a private individual "under like circumstances" is liable has been preserved.

This right of action for compensatory damages is the creation of Congress, and, in accordance with established principles, the law which is the source of an obligation to provide reparation for wrongful death "—determines not merely the existence of the obligation, *Smith* v. *Condry*, 1 How. 28, but equally determines its extent." *Slater* v. *Mexican National RR Co.*, 194 U.S. 120, 126.

(3) The decision of this Court in *Indian Towing Co.* v. *United States*, 350 U.S. 61, rendered November 21, 1955, requires the affirmance of the judgment of the District Court in this case. In *Indian Towing Co.*, it was decided by this Court that the liabilities which the United States assumed by the express language of the Tort Claims Act should not be curtailed by judicial interpretation. The refusal of this Court to depart from the plain language of this Act in limiting the liability of the United States in a manner which might be deemed equitable but which is not in accord with the express language of the Act would seem to settle the fundamental issue of the present case.

(4) The United States government has a firmly established policy of providing reparation for wrongful death in the form of compensatory damages measured by pecuniary loss to the survivors, without any arbitrary limitations on such damages. The great majority of the jurisdictions in which the Tort Claims Act is effective also deem it most appropriate to provide for the award of compensatory damages without arbitrary limits for wrongful death.

Hence, it was consistent and appropriate for Congress to select this form of remedy for wrongful death claims arising under the Tort Claims Act in places which have punitive statutes only, when it amended the Act to insert the special provisions applicable to such claims against the United States.

(5) The Massachusetts Death Statute provides for the recovery of damages ranging from $2,000. to $20,000. depending upon the degree of culpability of the defendant. The Circuit Court concedes that to apply the minimum limitation to death actions under the Tort Claims Act would result in the imposition of punitive damages on the United States (R. 32). However, it would carry over the maximum limitation of $20,000. and make this the ceiling for whatever compensatory damages are assessed under the formula provided by the Tort Claims Act (R. 23, 24). This ruling is based upon the assumed premise that Congress could not have intended to allow the assessment of unlimited damages when private individuals under like circumstances are subjected to limited liability even though of a different kind.

Such an interpretation is unwarranted because it not only contravenes the express language of the Act, but it is illogical, unjust and discriminates against Massachusetts claimants. When the Congress rejected liability for punitive damages and substituted "in lieu thereof," the liability for actual or compensatory damages measured by pecuniary loss, it stated in forceful and crystal clear language that all provisions of the local statute relating to the manner of fixing the damages, punitive in nature, were rejected. Such a death statute as exists in Massachusetts cannot be compared with any limited compensatory death statute, for no truly compensatory statute guarantees a minimum recovery. The assurance furnished to claimants under the Massachusetts statute of a minimum recovery

without proof of injury or damage is a valuable right. To take away this right and offer in substitution the right to such compensatory damages as may be proven, but subject to the same maximum limit as the punitive damages, is grossly unfair to Massachusetts claimants. Furthermore, it conflicts with the obvious purpose of the insertion by Congress of the words "in lieu thereof," after describing the way the compensatory damages should be computed on a wrongful death claim arising in a jurisdiction having only a punitive death statute.

Argument

I. The Federal Tort Claims Act as Amended, Construed Literally, Requires an Award of Full Compensatory Damages in This Case.

The Federal Tort Claims Act was first enacted in 1946 (60 Stat. 842). Sec. 410(a) of that act included the jurisdictional provisions now set forth in 28 U.S.C. 1346, (b), and the provisions imposing liability upon the United States now contained in the first paragraph of 28 U.S.C. 2674. Congress amended this Act in 1947 (61 Stat. 722), to add the provision now contained in the second paragraph of 28 U.S.C. 2674. This second paragraph is applicable to the facts in this case because the Massachusetts Death Act in force at the time of this accident was punitive in nature. This is clearly shown by the express language of that Act and by the decisions of the Massachusetts Supreme Judicial Court. See *Arnold* v. *Jacobs*, 316 Mass. 81; *Porter* v. *Sorell*, 280 Mass. 459; *Arruda* v. *Director General of Railroads*, 251 Mass. 255.

As stated in *Feres* v. *United States*, 340 U.S. 135, 140-141, that portion of the original Tort Claims Act now contained in 28 U.S.C. 1346(b), merely confers jurisdiction upon the United States Courts. "We interpret this language to mean all it says, but no more. Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for Courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law." The law defining the nature and extent of the liability assumed by the United States for wrongful death occurring under the circumstances of this case is set forth in the second paragraph of Section 2674. Hence, we must look to the language of this paragraph, when read in context with the

other provisions of this section, to find the law applicable to the issue raised in this case.

Sec. 2674, as amended, has three interrelated but distinct parts. First, it provides for the assumption by the United States of liability for ordinary tort claims in the following language:

> *"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances—"*

Then follows the exclusion of certain liabilities, i.e.:

> *"—but the United States shall not be liable for interest prior to judgment or for punitive damages."*

The third portion of this section, contained in the second paragraph and added by the 1947 amendment, deals with the liability of the United States for wrongful death, occurring in a place where a private individual under like circumstances is liable for punitive damages only, in the following fashion:

> *"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."*

Prior to the 1947 amendment there could be no recovery against the United States for a wrongful death in states which permits the recovery of punitive damages only in death actions. When this was called to its attention Congress amended the Act by adding this third provision. Having determined that the United States should provide some reparation for wrongful death in this situation Congress had the choice of either subjecting the United States to liability for punitive damages, as provided by the local death statute, or of undertaking to spell out and define the exact nature and extent of the damages for which the United States should become responsible. It chose to leave the flat prohibition against the award of punitive damages in actions against the United States as it was, and to add this new provision granting the right to compensatory or actual damages in lieu of the punitive damages recoverable from a private individual under like circumstances.

The intention of Congress to substitute the compensatory measure of damage for the punitive, but to adopt all other provisions of the local punitive death statute for the determination of liability of the United States, is necessarily implied from the language used to describe the situation in which this provision is applicable. In language that cannot possibly be misconstrued Congress has stated that whenever the local law would require the payment of punitive damages only for wrongful death caused by actionable misconduct of an employee of the United States, the United States shall be liable for the actual or compensatory damages, "in lieu thereof." Thus, Congress adopts all the local rules for determining the circumstances under which liability is imposed, who may bring suit, and for whose benefit the suit may be brought, but substitutes a completely new set of rules for determining the damages.

The liability which the United States so assumes is different in kind from the liability of a private individual

under like circumstances. No private individual causing wrongful death in Massachusetts or in any other jurisdiction having a purely punitive death statute, is subject to liability for actual or compensatory damages. Punitive damages, fixed arbitrarily or measured by degree of culpability, bear no relation whatsoever to the actual or compensatory damages flowing from a wrongful act. The two can never be equated, for the elements considered in determining the amount of each are entirely different.

The punishment deserved for negligent or reckless conduct which causes wrongful death is entirely unrelated to the fair compensation for the injuries suffered by the survivors of the deceased victim. This inequality is emphasized when consideration is given to the Massachusetts Death Statute which imposes penalties ranging from $2,000. to $20,000. on each individual guilty of causing wrongful death. This penalty is imposed without any regard whatsoever to the pecuniary loss suffered by the survivors of the deceased. It is imposed on each of several wrongdoers who may contribute to cause a wrongful death according to the degree of culpability of each and the liability is several, not joint, so no rights of contribution exist among the wrongdoers. *Arnold* v. *Jacobs*, 316 Mass. 81, 84. Hence, a particularly culpable act which causes the death of a person with no dependents or near relatives would warrant the imposition of the maximum penalty of $20,000. in a death action brought for the benefit of distant next of kin under the Massachusetts Death Statute, and if two or more persons contribute to cause the wrongful death, each may be held liable for that amount. On the other hand, the wrongful death of a man who is the sole support of a large family, and for whose death no amount of money could compensate for the injury thereby suffered would only warrant the imposition of the minimum penalty of $2,000. when the

wrongful act causing death was an inadvertent breach of the required standard of due care.

Death actions are wholly the creation of statutes, never having been recognized at common law. A statute creating a right of action for wrongful death necessarily determines the method of assessing damages. *Atchinson Topeka & Santa Fe RR* v. *Nichols*, 264 U.S. 348; *Slater* v. *Mexican National RR Co.*, 194 U.S. 120; *Jackson v. Anthony*, 282 Mass. 540, 545-546. The Commonwealth of Massachusetts has no compensatory death statute, but only allows an action for damages which are wholly punitive. Consequently, when Congress decided that the United States should pay compensatory damages for wrongful death caused by a government employee in Massachusetts, it was necessary for Congress itself to impose this liability upon the United States. That Congress did this intentionally and without equivocation is evident from the categorical statement, "the United States shall be liable for actual or compensatory damages—" under the circumstances recited. It would be difficult, indeed, to frame a more forceful statement of the intention to subject the United States to liability for the actual or compensatory damage measured by pecuniary loss in this particular situation.

If Congress had so wished, it could have limited those damages to the maximum allowed under the local punitive statute. That it did not do so should be sufficient answer to any contention that the damages measured in accordance with the rules the Congress has laid down should be limited to the maximum amount of the punitive damages recoverable under state law. Since this cause of action for wrongful death against the United States exists by force of the federal law, not the state law, we must look to that federal law alone to find the nature and extent of the rights of action created. Not only has Congress carefully defined the way damages are to be measured but it says they are

to be "in lieu" of the punitive damages prescribed by the state statute. In effect it has said these damages are to be awarded regardless of and in substitution for whatever punitive damages the law of the place deems appropriate.

To award suitable compensation for injury due to actionable misconduct of governmental employees is the manifest purpose of the original Tort Claims Act. By giving to the 1947 amendment the plain meaning of its language the unintentioned omission of rights of recovery against the United States for wrongful death in places having punitive death statutes is corrected. When the law of the place where the actionable misconduct occurs has rules for translating into money damages the extent of the injury due to wrongful death, those rules are adopted. When wrongful death occurs in a place which has a punitive death act, and there is no local law furnishing rules for determining compensatory damages, the Congress has written its own rules. Under these rules, as set forth in the clear and unambiguous language of the 1947 amendment, the pecuniary loss to the survivors of the deceased for whose benefit the action is brought is the only factor to be considered.

That Congress could have provided some different remedy is admitted. That Congress selected this remedy of all the possible remedies for wrongful death cannot be disputed. That Congress fully intended to grant the right to full compensatory damages, measured by pecuniary loss, as the remedy for wrongful death in this situation, is clearly shown by its careful choice of the language used. When one considers that the sole purpose of the addition made by the 1947 amendment was to provide a suitable compensatory remedy for wrongful death occurring in places which provided none, it imputes to the Congress an inconceivable carelessness in draftmanship to contend that it did not mean what was stated in such plain language.

II. The Decision of the Circuit Court of Appeals Is Based Upon a Policy of Statutory Interpretation Which Is in Direct Conflict with That Adopted by the Court for the Interpretation of the Tort Claims Act in *Indian Towing Co.* v. *United States*, 350 U.S. 61.

The Circuit Court of Appeals agrees with your petitioners that read literally, and in isolation, the language of the second paragraph of 28 U.S.C. Sec. 2674 requires the award of full compensatory damages in the case at bar (R. 22). However, that Court concludes that when read as a whole, the Tort Claims Act, as amended, does not express with sufficient clarity the intentions of Congress with respect to the matter now in issue, and it becomes the duty of the Court "to ascertain the intention of Congress" by the usual methods (R. 14, 28). The Court then considers the results of a literal interpretation of the pertinent language and finds what it calls an incongruity and discrimination which the Congress could not have intended, in that the United States may be required to pay greater damages than can be imposed upon a private employer in Massachusetts alone of all the States which limit the recovery for wrongful death (R. 22). To remove this incongruity, and what it believes an unintended consequence of giving effect to the language of the second paragraph of the act as written, it has ruled that the maximum limit of Massachusetts Death Statute constitutes the ceiling for compensatory damages recoverable from the United States for wrongful death.

Such intrusion by the Courts by judicial interpretation to modify or curtail the liabilities assumed by the United States in the Tort Claims Act was condemned in the recent case of *Indian Towing Co.* v. *United States*, 350 U.S. 61. In answer to the government's argument for an interpretation of the Act which would exclude liability for negligence

in maintenance of a lighthouse because state agencies incur no such liability when performing similar functions, this Court states, at page 68: "The language of the statute does not support the government's argument." Thus, the principle of giving full effect to the language of the Act and of construing liberally the grant of remedies therein contained was reaffirmed. See *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 555.

The plaintiffs submit that the Circuit Court decision in the instant case is based upon a policy of statutory interpretation which is directly contrary to that so recently reaffirmed by this Court in the *Indian Towing Co.* case. In the instant case, the Circuit Court, finding no equivalent liability of an individual for compensatory damage for wrongful death under Massachusetts law, would limit the amount of recovery to the maximum which the state law allows by way of punitive damages in order to carry out what it presumed to be the intent of Congress. That Court renounces and condemns a literal interpretation of the pertinent language of the Act which would subject the United States to greater liability for compensatory damages than the maximum punitive liability imposed upon a private individual under like circumstances.

The majority of this Court, by the *Indian Towing Co.* decision, refused to recognize any such paramount legislative intent to so limit the liabilities expressly assumed by the plain language of the Tort Claims Act. The ruling of this Court that the language pertinent to the facts in that case must be given its plain meaning is equally applicable to the present case. When it thus refused to permit a departure from the express language of the Act to limit the liability of the United States in a manner which may be deemed equitable but which is not in accord with the express language of the Act, it decided the fundamental

issue of the present case in favor of the plaintiffs' contentions.

It should be noted that the Circuit Court rendered its decision on October 31, 1955, whereas the *Indian Towing Co.* case was not decided until November 21, 1955. Also, the plaintiffs' petition to the Circuit Court for a rehearing was filed on November 30, 1955, before plaintiffs' counsel became aware of the tenor of that important decision of this Court. This time sequence explains why no reference appears in the Circuit Court's opinions to the *Indian Towing Co.* decision which has clarified and reaffirmed the policy of giving a literal and liberal construction to the provisions of the Tort Claims Act that became somewhat clouded by statements in *Feres* v. *U. S.*, 340 U.S. 135 and *Dalehite* v. *U. S.*, 346 U.S. 15 to the effect that the liability of the United States should not exceed the liability imposed by local law in analagous situations.

In *Indian Towing Co.* the claim was for negligence in maintenance of a lighthouse. In *Dalehite* one of the principal claims was for negligence of the coastguard in fighting fire. The minority opinion in the *Indian Towing Co.* case emphasizes the fact that, although presented with ample opportunity to amend the Tort Claims Act following the *Dalehite* decision, Congress did nothing and thus indicated that it was content with an interpretation of the Act which denied liability of the United States for negligence in fighting fires. The plaintiffs maintain that their contentions in the case at bar stand on much firmer ground than those of the claimants in *Indian Towing Co.* Congress was presented with the problem of providing for wrongful death claims arising in places having only punitive death statutes, and it did something about it. A new provision was added to provide expressly for the award of compensatory damages measured by pecuniary loss in such cases. The very thing was done which the minority in *Indian Towing Co.*

says should be done, if the full implications of the *Dalehite* decision are to be avoided. At 350 U.S. 75, Mr. Justice Reed states for the minority: "If Congress intended to create liability for all incidents not theretofore actionable against suable public agencies, that intention should be made plain. The Courts are not the legislative branch of the Government." Consequently, even on the interpretation given by the minority of this Court to the effects of the rulings in *Dalehite*, the present case is clearly distinguishable; and adherence to the principle of giving effect to the intention of the Congress, as manifested by the legislation it has enacted, requires affirmance of the judgment of the District Court in this case.

III. The Award of Full Compensatory Damages in this Case Is in Harmony with the Policy of the United States of Providing for the Award of Compensatory Damages Measured by Pecuniary Loss for Wrongful Death.

By the Suits in Admiralty Act, enacted in 1920, (46 U.S.C. 741-752) and the Public Vessels Act, enacted in 1925, (46 U.S.C. 781-790) the United States assumed liability for the payment of full compensatory damages measured by pecuniary loss for wrongful death on the high seas in accordance with the provisions of the Death on the High Seas Act (46 U.S.C. 761-768), and for such damages as the local law provides when wrongful death occurs within coastal or inland waters where local law is effective. See *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 458-460.

A clear parallel exists between the treatment of claims for wrongful death against the United States resulting from maritime activities of the Federal Government under these statutes, and such claims against the United States under the Tort Claims Act. Under the maritime statutes

referred to a wrongful death on the high seas gives rise to a claim for unlimited compensatory damages based upon pecuniary loss. However, if such a claim arises from wrongful acts in coastal or inland waters, damages are awarded in accordance with the law of the place having jurisdiction of the same. Under the Tort Claims Act, a wrongful death occurring in a place which provides no compensatory remedy, but confers only the right to punitive damages which Congress deems improper, the damages are measured by the pecuniary loss in exactly the same fashion as where the death occurs on the high seas. On the other hand, a claim for wrongful death arising in a place which provides a compensatory remedy is satisfied by the award of damages in accordance with the law of that place. As so construed, the Tort Claims Act is in perfect harmony with the Suits in Admiralty Act and the Public Vessels Act; and the maintenance of actions against the United States under these acts is provided for by 28 U.S.C. 2680(d). It was stated in *Feres* v. *U. S.*, 340 U.S. 135, 139, with reference to the Tort Claims Act, "This act, however, should be construed to fit so far as will comport with its words into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." It is submitted that the construction for which the plaintiffs contend accomplishes this result.

That Congress deems compensatory damage measured by pecuniary loss to be the most appropriate remedy for wrongful death is shown by United States Employers Liability Act (45 U.S.C. 51-59), the Merchant Marine Act (46 U.SC.. 688), as well as the Death on the High Seas Act referred to above. Each of these Acts creates a wrongful death action for unlimited compensatory damages measured by pecuniary loss. The plaintiffs know of no instance where Congress has created an action for wrongful death and placed an arbitrary limit on the damages recoverable there-

under except in early legislation affecting the District of Columbia, and even there the wrongful death statute has now been revised to provide for unlimited compensatory damages, (See District of Columbia, 1951 Code, 16-1201). The tenor of all this federal wrongful death legislation shows that Congress has recognized that there is no valid reason for placing arbitrary limitations on the compensatory damages recoverable for wrongful death. When no such limits are placed upon the damages for personal injury what conceivable reason can there be for limiting the damages for wrongful death, the supreme and ultimate injury, the injury that transcends all injuries? Compensation by way of money damages at best must fall short of full reparation for wrongful death, even as it does in the case of many personal injuries which maim, disfigure, and destroy the prospect of the enjoyment of a normal human life.

The sole plausible reason for placing limits on the recovery in a compensatory death action is the fear that juries may become so vindictive toward the person or persons causing a tragic death or so sympathetic with the plight of the claimants that excessive verdicts will be awarded. This is hardly a valid reason when no such limits are placed upon the damages for conscious suffering preceding death or upon the damages for serious and disabling personal injuries. Moreover, there is no ground for fearing unreasonable jury verdicts in suits against the United States under the Tort Claims Act, because all such actions are tried before a judge without a jury. (28 U.S.C. 2402)

When Congress was faced with the problem of amending the Tort Claims Act to provide damages for wrongful death in lieu of punitive damage furnished by local law, it was fitting that it should follow the precedent furnished by prior Federal legislation dealing with wrongful death and substitute for punitive damages " . . . the actual or

compensatory damages, measured by pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof." Compare this language with that used to describe the damages under the Death on the High Seas Act, 46 U.S.C. 762, which reads, "The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought—". Is it not evident from a reading of these corresponding provisions that Congress intended the rule of damages under this portion of the Tort Claims Act to be exactly the same as that which it established for death on the high seas many years previous? If it had intended to have the maximum damage limitation of the local punitive death statute apply, would it not have so stated when it used this language of well settled meaning to define the damages? Furthermore, the adoption of this rule for measuring the damages by the pecuniary injury or loss to surviving dependents conforms with the well established policy of the Federal Government of providing this form of reparation for wrongful death in places where the Federal government has chosen to exercise its jurisdiction.

IV. No Incongruity or Discrimination Results from the Allowance of the Recovery of Full Compensatory Damages Against the United States Under the Circumstances of This Case.

It is entirely consistent and logical for Congress to respect state policy in limiting compensatory damages for wrongful death, as it has in the Tort Claims Act, by providing that the United States shall be liable only to the same extent as private individuals, and, at the same time, allow the recovery of full compensatory damages when no such policy is present. Massachusetts has no policy, one way or

the other, with respect to this matter of limiting compensatory damages for wrongful death. It allows recovery in its courts of full compensatory damages in wrongful death actions created by the laws of another state, even though that other state will not permit its courts to grant the limited damages provided for by the Massachusetts Death Statute because of its punitive nature. *Jackson* v. *Anthony*, 282 Mass. 540, 546-547 (1933). *McGrath* v. *Tobin*, . R.I. , 103A 2d 795 (1954).

At the present time by death or survival of action statutes, 46 of the 48 states provide for the award of compensatory damages for wrongful death. Only 2 States, Massachusetts and Alabama, have punitive death statutes of general application. Of the 46 states providing compensatory remedies for wrongful death, 33 allow unlimited damages and 13 place maximum limits on the amounts recoverable. The Alabama Death Statute, construed to be punitive, has no maximum or minimum limits on damages. See *Heath* v. *United States*, 85 F. Supp. 196 (N.D. Ala.). Hence, Massachusetts with its punitive death statute providing for damages ranging from a minimum of $2,000. to a maximum of $20,000. is the only state in the Union which has a punitive death statute of general application with arbitrary minimum and maximum limits on damages, although a few states have statutes of this character applicable to deaths caused by railroad and other carriers.[1]

---

[1] See Developments in the Law: Damages 1933-1947, 61 Harv. L. Rev. 113, 166-169 for a summary of the types of wrongful death legislation effective in the 48 states. See also 26 Indiana L. J. 428, 440, n. 40 (1951) and 48 W. Vir. L. Rev. 255, 257 (1942) which list 15 states that place limits on the recovery allowed for wrongful death and 33 which allow unlimited damages. Included in the group of 15 states with limitations on damages are Massachusetts, which has a punitive death statute, and Connecticut, which by Gen. Stat. Supp. 1951, Sec. 1392 (b) discarded the maximum limitation on the compensatory damages provided for in its statute. Hence, it now appears that only 13 states, with compensatory death statutes, set

In the light of this summary of the types of wrongful death legislation effective in places covered by the Tort Claims Act and the character of the federal legislation dealing with wrongful death heretofore referred to, it can hardly be deemed incongruous or discriminatory for Congress to substitute unlimited compensatory damages for punitive damages when amending the Tort Claims Act in 1947 to take care of wrongful death claims arising in the few jurisdictions having punitive death statutes. The history of federal legislation on remedies for wrongful death indicates clearly the policy of Congress to provide compensation based upon pecuniary loss for wrongful death wherever it has jurisdiction. The fact that a minority of 13 states by legislative fiat still place limits on the compensatory damages recoverable for this great wrong furnishes no sound reason for the charge that by giving effect to the literal interpretation of this Act there is discrimination against those states. This Act, as amended, merely reflects the congressional intent to respect their policies, and to subject the United States to the same limited liabilities

---

maximum limitations on the compensatory damages recoverable thereunder. Of the 33 states allowing unlimited damages only Alabama has a death statute construed to be wholly punitive. Connecticut now belongs in this group of states and this makes a total of 33 states which grant the right to unlimited compensatory damages for wrongful death as against 13 which place arbitrary maximum limits on such damages.

In addition to Massachusetts and Alabama which have general death statutes that are wholly punitive in nature, Colorado, Missouri and New Mexico have punitive death statutes applicable to deaths caused by railroads and other common carriers. 1935 Colorado Stats. c. 50, sec. 1, as amended by Laws 1951, p. 338, sec. 1 (damages between $3000 and $10,000). 1949 Missouri Rev. Stats. 537.070 (damages between $2000 and $10,000). 1941 New Mexico Stats. Anno. 24-104, as amended by 1947 Laws, c. 125, sec. 1 (damages between $2000 and $10,000). If the Government were to cause wrongful death while engaged in railroad operations in any of these states, the provision of the Tort Claims Act substituting compensatory for punitive damages will be applicable.

which they deem proper. However, when the local law gives the right to punitive damages only, and the United States declines to subject itself thereto, the grant of the same right of recovery as exist in the great majority of jurisdictions where the Tort Claims Act is operative seems most fitting and appropriate.

Furthermore, the limitation of the amount of compensatory damages recoverable from the United States on a wrongful death claim arising in Massachusetts to the maximum of $20,000, provided by the Massachusetts punitive death statute cannot be justified on any principles of logic or equity, when the minimum limitation of $2,000 damages is rejected. The Circuit Court agrees that the minimum limitation cannot be applied in actions against the United States because of the strict prohibition against punitive damages contained in the Tort Claims Act (R. 32). When Congress rejected the punitive measure of damage did it not necessarily reject the maximum and minimum limitations on such damages? The Massachusetts Death Statute is wholly punitive and the limitations on the damages or penalties recoverable thereunder are an integral part of the statutory scheme for supplementing the criminal laws dealing with homicide with punitive death actions imposing penalties which are relinquished by the state to surviving next of kin of the deceased. "Like all punitive legislation the death statutes prescribe the extent of the punishment." *Porter* v. *Sorell*, 280 Mass. 457, 461. See also, *Oliveria* v. *Oliveria*, 305 Mass. 297, 301, where this statute was characterized as follows: "Although an action under it wears the aspect of a civil suit and results in compensation to the surviving spouse and next of kin to the extent of the sum recovered, yet the damages are assessed wholly with reference to the degree of culpability of the defendant and constitute in effect a fine levied upon him for his wrongful conduct."

The assurance furnished by the Massachusetts Statute of an award of not less than $2,000, for every wrongful death, without any proof of injury or damage to the survivors of the deceased, is a valuable right which tends to compensate for the maximum limitation on the possible punitive recovery. No truly compensatory death statute, with or without maximum limitations on the damages recoverable, can give such an assurance. This minimum limitation on damages in the Massachusetts statute makes it utterly impossible to equate the damages recoverable thereunder with those provided by any compensatory statute. It also destroys the basis for Circuit Court's opinion that there would be discrimination against claimants in death actions arising in states having limited compensatory death statutes if Massachusetts claimants were allowed to recover from the United States their full compensatory damages. In fact, there would be discrimination against Massachusetts claimants if the Circuit Court's ruling were allowed to stand, for they are thereby deprived of the benefit of the Massachusetts minimum limitation on damages, but must bear the burden of the maximum limitation and remit so much of their compensatory damages, measured by pecuniary loss, as exceeds that limit.

When Congress added to the Tort Claims Act the formula for determining the compensatory damages for which the United States shall be liable in places where punitive damages only are awarded for wrongful death and stated that such compensatory damages were "in lieu thereof", it emphasized its intention to substitute completely this compensatory measure of damage for whatever method was provided by the local law for fixing the punitive damages. In effect Congress has said that claimants in wrongful death actions against the United States shall have the right to prove their actual pecuniary loss resulting from such death in lieu of the punitive damages they might be entitled to

receive under the local law. If the Massachusetts maximum limitation of punitive damages is now carried over and made the ceiling for the amount of pecuniary loss that can be proven, while the minimum limitation on such punitive damages is ignored, the whole force and effect of the words "in lieu thereof" is destroyed. Under such a ruling, Massachusetts claimants are made to suffer the burden of the maximum limitation on the punitive damages recoverable from a private individual under like circumstances, but are deprived of that very valuable right of an assured minimum recovery of $2000. against a private individual.

Regardless of what may be considered the most fair and equitable solution to the problem of providing for reparation for wrongful death claims against the United States in places allowing the recovery of punitive damages only in actions against private individuals, it is not for the Courts to determine whether or not Congress has enacted the most suitable legislation to take care of such claims. As long as the law enacted can be construed to effect reasonable results, it must be carried out. Certainly, in the situation under discussion, the Congress has set forth in clear language of settled meaning its intention to substitute completely the remedy of compensatory damages measured solely by pecuniary loss to survivors of deceased. This action by Congress is not only consistent with prior federal legislation on this subject but it is in complete harmony with the prime purpose of the Tort Claims Act, which is to provide fair and just compensation for injuries suffered through actionable misconduct of government employees.

Conclusion

Compensatory damages can never be equated to punitive damages. It appears that Congress was well aware of this fact when it chose to substitute an award of compensatory damages measured by pecuniary loss for the punitive damages recoverable for wrongful death under local death statutes. The Circuit Court would do what the Congress could have done but failed to do, that is, place a limit on those damages equal to the maximum punitive liability of a private individual under like circumstances. For the reasons hereinabove set forth your petitioners respectfully submit that the Circuit Court erred in ruling that the damages in this case are subject to that arbitrary maximum limitation and the judgment of the District Court awarding to the plaintiffs their actual or compensatory damages, measured by the pecuniary loss to the persons for whose benefit this suit was brought, should be affirmed.

JOHN R. KEWER
Attorney for the Petitioners
60 State Street
Boston, Massachusetts

JOHN M. HOGAN
EDWARD A. CRANE
60 State Street
Boston, Massachusetts
of Counsel.

No. 457

In the Supreme Court of the United States

OCTOBER TERM, 1955

MASSACHUSETTS BONDING AND INSURANCE COMPANY AND KATHLEEN F. CROWLEY, ADMINISTRATRIX OF ESTATE OF JEREMIAH C. CROWLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

[redacted]
Solicitor General,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 657

MASSACHUSETTS BONDING AND INSURANCE COMPANY AND KATHLEEN F. CROWLEY, ADMINISTRATRIX OF ESTATE OF JEREMIAH C. CROWLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

As is evident from the two exhaustive opinions of the court of appeals in this case (R. 13-24, 27-37), resolution of the question petitioner raises *viz.*, whether the damages recoverable under the Federal Tort Claims Act in an action for wrongful death which occurred in Massachusetts may exceed the $20,000 maximum fixed by the Massachusetts Death Statute, turns on issues of both federal and local law. In the light of that court's full and detailed treatment of the federal and local law prob-

lems involved, we think it unnecessary to rehearse or paraphrase the court's exposition, particularly in view of that court's expert knowledge of Massachusetts law and the special competence in tort law of the author of the opinions (Chief Judge Magruder). We submit, for the reasons set forth in the two opinions of the court of appeals, that the judgment below is clearly correct.

There is not, and probably never will be, a conflict on this question since, as the petition concedes (Pet. 6-7), Massachusetts is the only state with a punitive death statute of general application which places maximum limits on the recovery.[1] No problem of general importance is presented and further review is, therefore, not warranted.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

FEBRUARY 1956.

---

[1] Should a Massachusetts wrongful death action come before some other court of appeals, under the peculiar venue provisions of the Tort Claims Act, it may safely be assumed that that court would follow the carefully reasoned opinions in this case, both because of their soundness and because of the natural deference which would attach to any interpretation of Massachusetts law by the Court of Appeals for the First Circuit.

☆ U. S. GOVERNMENT PRINTING OFFICE 1956 975593 973

No. 31

In the Supreme Court of the United States

OCTOBER TERM, 1956

MASSACHUSETTS BONDING & INSURANCE CO. AND KATHLEEN F. CROWLEY, ADMINISTRATRIX OF THE ESTATE OF JEREMIAH C. CROWLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
PAUL A. SWEENEY,
HERMAN MARCUSE,
Attorneys, Department of Justice,
Washington 25, D. C.

INDEX

CITATIONS

Cases:

Cases—Continued

Statutes:

Statutes—Continued

Statutes—Continued

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 31

MASSACHUSETTS BONDING & INSURANCE CO. AND KATHLEEN F. CROWLEY, ADMINISTRATRIX OF THE ESTATE OF JEREMIAH C. CROWLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court did not write an opinion. The original opinion of the Court of Appeals (R. 13-24) and the opinion on rehearing (R. 27-37) are reported at 227 F. 2d 385.

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1955 (R. 24). A petition for rehearing, filed on November 30, 1955, within time duly enlarged by the Court of Appeals (R. 25), was denied on

December 15, 1955 (R. 37). The petition for certiorari, filed on February 1, 1956, was granted on March 5, 1956 (R. 38, 350 U. S. 980). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 28 U.S.C. 2674(2), designed to enable compensatory recovery for wrongful death under the Tort Claims Act where the applicable state law provides only for punitive damages, has the additional effect of eliminating a ceiling upon death-claim recoveries established by such state law, thus permitting a recovery against the United States in this case which is three times as high as the highest award to which a private person would be liable.

STATUTES INVOLVED

1. The Federal Tort Claims Act provides in pertinent part:

a. 28 U.S.C. 1346(b).

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in

accordance with the law of the place where the act or omission occurred.

b. 28 U.S.C. 2674. *Liability of the United States.*

(1) The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

(2) If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

2. The Massachusetts Death Act (Mass. G.L. (Ter. Ed.) C. 229)[1] provides in pertinent part:

§ 2C. *Damages for Death by Negligence, etc.; General Provisions.*

Except as provided in sections one, two and two A,[1a] a person who by his negligence or by his wilful, wanton or reckless act, or by the negligence or wilful, wanton or reckless act of his agents or servants while engaged in his business, causes the death of a person in the exercise of due care, who

[1] Our citations refer to the annotated edition of the Massachusetts General Laws (Ter. Ed.).

[1a] Sections 1, 2 and 2A contain special provisions involving deaths caused by defective highways, bridges, or common carriers.

is not in his employment or service,[2] shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability or of that of his agents or servants, to be recovered in an action of tort, commenced, except as provided by sections four and ten of chapter two hundred and sixty, within two years after the injury which caused the death by the executor or administrator of the deceased, to be distributed as provided in section 1.[3]

STATEMENT

In 1952, a contractor, P. J. Spillane, undertook to rehabilitate steel sash at the Watertown Arsenal owned and operated by the United States (R. 3, 7). The deceased, Jeremiah C. Crowley, was an employee of the contractor (R. 7). On December 22, 1952, while repairing window sashes, Crowley was struck by one of two colliding cranes. He fell to the floor and died either as the result of the blow or of the fall (R. 7-9).

---

[2] The death of an employee is governed by Section 2B.

[3] Mass. G.L. (Ter. Ed.) C. 229, § 1 provides in pertinent part that the action of the executor or administrator shall be brought to the use of the following persons and in the following shares:—

"(1) If the deceased shall have been survived by a wife or husband and no children or issue surviving, then to the use of such surviving spouse.

"(2) If the deceased shall have been survived by a wife or husband and by one child or by the issue of one deceased child, then one half to the use of such surviving spouse and one half to the use of such child or his issue by right of representation.

"(3) If the deceased shall have been survived by a wife or husband and by more than one child surviving either in person or by issue, then one third to the use of such surviving spouse and two thirds to the use of such surviving children or their issue by right of representation.

"(4) If there is no surviving wife or husband, then to the use of the next of kin."

In an action brought by Crowley's administratrix and Massachusets Bonding and Insurance Co., which had paid compensation for Crowley's death (R. 4, 11), the District Court found that the collision of the two cranes had been caused by the negligence of one White, a crane operator, who was a government employee (Fdgs. 5-12, R. 7-9; Concls. 4-6, R. 10).

Under the Massachusetts Death Act (*supra*, pp. 3-4), a person individually or vicariously responsible for wrongful death is "liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability" of the tortfeasor. This statute has been interpreted by the Massachusetts courts to be of a punitive nature. According to 28 U.S.C. 2674(2) (*supra*, p. 3) the United States is liable for actual or compensatory damages in those instances in which the applicable law[4] provides only for punitive damages.

Government counsel argued (R. 5-6) that the reference in 28 U.S.C. 2674(2) to actual or compensatory damages related only to the theory pursuant to which the damages were computed and had no bearing on the limitation of the amount of damages recoverable; hence, that the Government was not precluded from claiming the benefit of the $20,000 ceiling provided for by the Massachusetts Death Act. The District Court, however, ruled (Concl. 6, R. 10) that petitioners were entitled to compensatory damages pursuant to 28 U.S.C. 2674 and that these damages:

> * * * are measurable by the pecuniary injuries resulting to those next of kin from Crowley's death;

[4] *I. e.*, the law of the place where the act or omission complained of occurred (28 U.S.C. 1346(b), 2674(2))

and the damages are not limited by the minimum and maximum set forth in Mass. G.L. (Ter. Ed.) C. 229 § 2C, as amended * * *.

The Government appealed, raising only the question as to whether the damages recoverable against the United States were limited by the $20,000 ceiling of the Massachusetts Death Act (R. 14). The Court of Appeals reversed (R. 24).

The court stated that the 1947 Amendment to the Tort Claims Act (now 28 U.S.C. 2647(2), *supra*, p. 3) which provided for the assessment of actual or compensatory damages against the United States where the otherwise applicable state law provides for "damages only punitive in nature" constitutes an exception to the basic theory underlying that statute, *viz.*, that the United States should be liable for the negligent or wrongful act or omission of a Government employee in the same manner and to the same extent as a private individual "under like circumstances." It noted that the amendment was motivated by a legislative fear that, in view of the prohibition against the award of punitive damages against the United States (28 U.S.C. 2674(1), *supra*, p. 3), the statute would not be operative in death action in those jurisdictions—believed to be Alabama and Massachusetts[5]—which allow only punitive damages for wrongful death (R. 17-18).

The court pointed out that while such award of punitive damages in death cases was limited to Alabama and Massachusetts, restrictions on the amount

[5] The court pointed out that this assumption was then erroneous with respect to Massachusetts which from January 1, 1947 to December 31, 1949, provided for the assessment of compensatory damages of not less than $2,000 nor more than $15,000 in death cases (R. 20-21, and see *infra*, fn. 21, pp. 20-21).

of recovery existed not only in Massachusetts but in about a dozen jurisdictions awarding compensatory damages,[6] and that those ceilings were not affected either by the original act nor by the 1947 Amendment (R. 20). The court, therefore, refused to construe the 1947 Amendment, "intended to remove what was deemed to be a discrimination in a very narrow situation", in a manner which would "effectuate a far greater discrimination and incongruity" (R. 22), *viz.*, to eliminate the ceiling on recoveries only in Massachusetts, while letting them stand in more than twelve other states. It held that 28 U.S.C. 2674(2) could not be read "literally and in isolation" (R. 22), but as a part of "an organic whole" (R. 23), and that the 1947 Amendment did not indicate any objection to the maximum limit of recovery under the laws of Massachusetts or of any other jurisdiction, but merely to the assessment of damages against the United States on a punitive theory (R. 23).

The court concluded that "except where Congress has clearly provided otherwise, it is the general scheme of the Tort Claims Act to refer questions of liability of the United States to the provisions of the law of the place where the act or omission occurred" (R. 23) and that in the absence of any clear prohibition against ceilings on the recovery the pertinent state law remains applicable.

On petition for rehearing, the Court of Appeals adhered to its decision. It stressed again that it taxed its credulity to suppose that the 1947 Amendment, designed to permit recovery in death actions in Massachusetts and Alabama, should have the effect that, in

[6] For details, see *infra*, p. 13, fn. 10.

Massachusetts alone, claimants under the Torts Claims Act would not be bound by the statutory limit on recovery (R. 29). The court also pointed out that under the Massachusetts decisions the Death Act was not considered to be exclusively punitive. While the damages were assessed on a punitive basis, the act admittedly served a compensatory purpose (R. 30).[7] In fact during the three years that damages in death actions were assessed in Massachusetts on a compensatory basis (see fn. 5, *supra*, p. 6), they were subject to the same ceiling and floor as before and after that interlude (R. 33). The court concluded, as in the original opinion, that the sole effect of the 1947 Amendment was to provide for the assessment of damages on a compensatory basis, and that the local law remained unchanged on subjects such as the determination of who has the right to sue and on whose behalf, the effect of contributory negligence or of a release, or, as here, the imposition of ceilings on the recovery (R. 36).

SUMMARY OF ARGUMENT

I

The basic theory of the Federal Tort Claims Act is that the United States shall be liable for the wrongful acts or omissions of its employees in the same manner and to the same extent as a private individual, in accordance with the law of the place where the tort was committed. This Court has persistently refused to depart from this governing principle, in the absence of a specific congressional mandate. Here, petitioners' claim must run counter to the basic principle because

---

[7] See also *infra*, pp. 20-21.

they assert that they are entitled to recover from the United States $60,000 for a wrongful death claim governed by Massachusetts law, although under the laws of that state the liability of the tortfeasor or of his employer could not exceed $20,000. The anomaly of this claim is highlighted by the circumstance, conceded by petitioners, that 28 U.S.C. 2674(2) (*supra*, p. 3)—the basis of their contention—leaves intact the ceilings on the recoveries in death cases in the other fourteen jurisdictions which have such restrictions. Massachusetts alone is said to have a special status.

II

The sole congressional aim which lead to the enactment of 28 U.S.C. 2674(2) was to make certain that there could be a recovery in death cases based on the laws of Alabama and Massachusetts. 28 U.S.C. 2674(2) was not a part of the original Tort Claims Act. Its enactment was prompted by the prohibition in 28 U.S.C. 2674(1) (*supra*, p. 3) against the award of punitive damages. When the Tort Claims Act became effective in 1946, two states, Alabama and Massachusetts, assessed damages in tort death cases according to the degree of culpability of the tortfeasor. In local usage these damages were called "punitive damages" although they differed in many significant aspects from punitive damages as that term is understood in federal and general law.

In the summer of 1947, Congress was advised that the District Courts in Alabama had threatened to dismiss death actions against the United States on the ground that they called for punitive damages. Unknown to Congress, the Massachusetts Death Act had been

amended—effective January 1, 1947—so as to award compensatory damages.[8]

Assuming that the punitive-damage exception in 28 U.S.C. 2674(1) was fatal to recovery in death cases governed by the laws of Alabama and Massachusetts, Congress added to the Tort Claims Act what is now 28 U.S.C. 2674(2). The sole reason for this amendment was stated by a member of the Committee (App., *infra*, p. 59) to be:

> * * * to do right by Alabama and Massachusetts * * * not * * * to give them a privileged status over the other states.

The Committee reports point out that the amendment was designed to remove an "unjust discrimination never intended," to "grant to the people of two States the right of action already granted to the people of the other 46."

The purpose of the 1947 amendment thus was to bring death claims governed by the laws of Alabama and Massachusetts within the framework of the Tort Claims Act, not to create an exception from its basic theory that tort claims against the United States should be assimilated to the vicarious liability of a private employer in like circumstances.

III

A. Petitioners' contentions are based largely on the argument that the words "actual or compensatory damages, measured by the pecuniary injuries resulting from such death," in 28 U.S.C. 2674(2), mean "*full*

[8] In 1950, Massachusetts reverted to the method of assessing damages according to the degree of culpability. Alabama does not have a limit on recoveries under its Death Act.

actual or compensatory damages * * *". 28 U.S.C. 2674 (2), however, is concerned only with the measure or manner of recovery; it substitutes compensatory damages for "punitive" damages—those imposed according to the degree of culpability. It has no bearing, however, on the *extent* of the recovery, i.e., the maximum permissible recovery. Moreover, Section 4 of the Death on High Seas Act—which provides for compensatory recovery "without abatement in respect to the amount" —shows that where Congress actually seeks to eliminate ceilings on the recovery in death cases it does so expressly and unmistakably.

B. The floor and ceiling on the recovery of the Massachusetts Death Act are not so closely connected with the punitive nature of the statute that they are inconsistent with the computation of the damages on a compensatory basis. Massachusetts had the same floor and ceiling on recovery during the three years during which it awarded compensatory damages in death cases (see *supra*, pp. 6, fn. 5; 8). Moreover, fourteen states which grant compensatory damages in death cases limit the amount of the award, while Alabama which imposes "punitive damages" does not; this establishes conclusively the absence of any interrelation between limitations on and the theory of, the recovery.

C. Petitioners are not aided by the circumstance that in many fields of federal jurisdiction, especially in admiralty, there are no ceilings on recovery in death cases. The absence of limitations on death awards in admiralty goes back to the express language of Section 4 of the Death on High Seas Act. See *supra*, this page. There is no corresponding provision in the Tort Claims Act. Besides, in the Tort Claims Act Congress has

deferred to state law; general federal policies established in other fields are of no avail to petitioners.

Finally, there is no merit to petitioners' contention that Congress deliberately singled out Massachusetts and decided that its ceiling on death awards should be ignored because Massachusetts permits the award by its courts of full compensatory damages in cases governed by the law of other states. This, however, is no peculiarity of Massachusetts law; it merely represents the general conflicts rule that the forum will apply the law of the place of the tort, including the law governing the extent of the recovery. Massachusetts does not differ in this respect from the fourteen other jurdictions placing limitations on judgments for wrongful death.

Petitioners have failed to show any valid basis for their contention that 28 U.S.C. 2674(2) was designed to depart from the fundamental theory of liability under the Tort Claims Act. Their recovery should not be allowed to exceed the highest award which could be rendered against private individuals in like circumstances.

ARGUMENT

Petitioners' claim is for wrongful death. Under the Massachusetts punitive-damage statute (*supra*, pp. 3-4), the court may award damages of no less than $2,000 nor more than $20,000.[9] In spite of this limitation placed on the recovery by the state law, petitioner seeks to recover from the United States $60,000—a sum three times the maximum which may be recovered under

[9] We do not take any position on the question, not presented here, and not likely to be of any practical importance, whether the $2,000 minimum placed on the recovery is also applicable to the United States in a death action. The resolution of that question, if it ever arises, should await a concrete case.

Massachusetts law from a private person. In order to support this claim petitioners must make two contentions. First, they assert that in enacting 28 U.S.C. 2674(2) (*supra*, p. 3)—providing for "actual or compensatory" damages under the Tort Claims Act in punitive-damage states—Congress deliberately and radically departed from the basic theory of the Tort Claims Act, which assimilates the liability of the United States to that of a private employer in like circumstances. Second, they claim that 28 U.S.C. 2674(2) was designed to single out Massachusetts among the fifteen jurisdictions which place limitations on recovery in death cases,[10] by providing that in wrongful death actions against the United States governed by the laws of Massachusetts the statutory restrictions on the amount of the recovery have to be ignored, while such limitations remain in full effect if the claim is governed by the laws of any of the other fourteen jurisdictions.[11]

We shall show that petitioners' reading of 28 U.S.C.

---

[10] The fourteen other jurisdictions are: Alaska: Compiled Laws Annotated, 1949 § 61-7-3, as amended by Laws of 1955, Ch. 153—$50,000; Colorado: Revised Statutes, 1953, Section 41-1-3—$10,000; Illinois: Jones Ill. Statutes Annotated, Section 38.02, as amended by Laws of 1955, H.B. 777 or 565—$25,000 or $20,000; Indiana: Burns' Annotated Statutes, Section 2-404, as amended by Acts of 1949, Ch. 42, § 1—$15,000; Kansas: General Statutes, 1955 Supp., § 60-3203—$25,000; Maine: Revised Statutes, 1954, Ch. 165, § 10—$10,000; Minnesota: Statutes Annotated, § 573.02, as amended by Laws of 1951, Ch. 697—$17,500; Missouri: Vernon's Missouri Statutes Annotated, § 537.090, as amended by Laws of 1955, S.B. 171—$25,000; New Hampshire: Revised Statutes Annotated (1955), § 556:13—$7,500-$15,000; Oregon: Revised Statutes, 1955, § 30.020—$20,000; South Dakota: Code (1939), 1952 Supp., § 37.2203—$20,000; Virginia: Code 1950, § 8-636, as amended by Laws of 1952, c. 60—$25,000; West Virginia: Code 1955, § 5475—$10,000-$20,000; Wisconsin: Statutes 1953, § 331-04—$15,000-$25,000.

[11] Cf. *Eastern Air Lines* v. *Union Trust Co.*, 221 F. 2d 62, 80-81 (C.A.D.C.), certiorari denied *sub nom. Union Trust Co.* v. *United States*, 350 U.S. 911, in which the Virginia limitation was observed.

2674(2) contravenes the basic theory of the Tort Claims Act; that it is in conflict with the specific purpose Congress sought to accomplish when it enacted 28 U.S.C. 2674(2); and that it does not find any support in the statutory language or context.

I

In the Absence of Specific Congressional Mandate, There Should Be No Departure from the Basic Theory of the Tort Claims Act Under Which the Liability of the United States Is Assimilated to that of a Private Employer.

The basic theory under which the United States assumed responsibility in tort is that the United States is liable pursuant to the rules of *respondeat superior* for the acts and omissions of its employees in the same manner and to the same extent as a private individual in like circumstances, in accordance with the law of the place where the alleged tort was committed. 28 U.S.C. 1346(b), 2674(1); *Feres* v. *United States*, 340 U.S. 135, 141; *United States* v. *Brown*, 348 U.S. 110, 112; *Williams* v. *United States*, 350 U.S. 857; *United States* v. *Campbell*, 172 F. 2d 500, 503 (C.A. 5), certiorari denied, 337 U.S. 957. Accordingly, under this fundamental theory of responsibility, the liability of the Government cannot exceed that of the actual tortfeasor, or that of his employer. Under Massachusetts law the liability of either of these cannot surpass the sum of $20,000.

This Court has been vigilant in checking any inroads into these fundamental principles of governmental liability under the Tort Claims Act. It has uniformly resisted governmental claims for exemption from liability to which a private employer in like circumstances would have been subjected, unless it has considered that

the asserted exception was based upon the express language of the statute or followed from it by necessary implication. *Brooks* v. *United States*, 337 U.S. 49, 51-53; *United States* v. *Aetna Surety Co.*, 338 U.S. 366, 383; *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 550, 554; *United States* v. *Brown*, 348 U.S. 110, 112-113. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68-69.

The rationale of these decisions is not, as petitioners seem to contend, a mechanical rule that the Tort Claims Act is always to be construed liberally in favor of the claimant, but rather that departures from the basic rule of governmental liability, as set forth in the Tort Claims Act, are not readily to be countenanced. In other words, while the rigor of the doctrine of sovereign immunity is not to be preserved by subjecting the Government's consent-to-be-sued to restrictive refinements,[12] neither is profligacy to be promoted by overgenerous or careless construction.[13]

Petitioners claim that 28 U.S.C. 2674(2) entitles them to a recovery three times as high as that to which the actual tortfeasor and his employer, were he a private person, could be subjected in Massachusetts. This anomalous result is at least *prima facie* suspect because it departs from the fundamental theory of the Tort Claims Act, destroying its symmetry; in addition, the result is not in accord either with the special congressional purpose which lead to the enactment of 28 U.S.C. 2674(2), nor with the statutory language.

---

[12] *United States* v. *Aetna Surety Co.*, 338 U.S. 366, 383; *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 554; cf. *Anderson* v. *Hayes Construction Co.*, 243 N.Y. 140, 147.

[13] *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69.

II

The Sole Legislative Purpose Which Motivated the Enactment of 28 U.S.C. 2674(2), Providing for Compensatory Damages Where the State Wrongful-Death Act Is Punitive, Was to Permit Recovery for Wrongful Death in Alabama and Massachusetts in Which Only Punitive Damages Can Be Awarded for Such Claims.

This case involves the interpretation, *i.e.*, the determination of the meaning,[14] of 28 U.S.C. 2674(2) which originally was enacted in 1947 as an amendatory proviso (61 Stat. 722) to 28 U.S.C. 2674(1), then Section 410(a) of the Tort Claims Act. (60 Stat. 843, 28 U.S.C. (1946 Ed.) 931). In our view, an examination of the events which lead to the enactment of 28 U.S.C. 2674(2) is indispensable to a proper understanding of that subsection.

A. *The Effect of 28 U.S.C. 2674(1), prohibiting the award of punitive damages under the Tort Claims Act, Upon Death Cases Governed by Statutes Providing for Recovery According to the Culpability of the Tortfeasor.*

1. *28 U.S.C. 2674(1).* According to 28 U.S.C. 2674(1) (*supra*, p. 3), the United States is liable on tort claims "in the same manner and to the same extent as a private individual under like circumstances, *but shall not be liable * * * for punitive damages.*" (Emphasis added). As defined by this Court,[15] punitive or

---

[14] Frankfurter, *Some Reflections on the Reading of Statutes*, (1947) 47 Columbia Law Review 527, 533.

[15] Inasmuch as the award of punitive damages constitutes an exception to the coverage of the Tort Claims Act, the definition of the term appears to be determined by federal or general law. A state cannot be permitted to circumvent or to broaden the intended exception through the medium of an unusual definition. *Stepp* v. *United States*, 207 F. 2d 909, 911 (C.A. 4), certiorari denied, 347 U.S. 933; *Missouri Pacific R.R. Co.* v. *Ault*, 256 U.S. 554, 565.

exemplary damages constitute an award *added* to compensatory damages where the defendant had acted intentionally or in a wanton, malicious, or outrageous manner. They are not granted in the case of a mere negligent tort. *Day* v. *Woodworth*, 13 How. 363, 371; *Lake Shore, etc. Ry. Co.* v. *Prentice*, 147 U.S. 101, 107; *Scott* v. *Donald*, 165 U.S. 58, 86.[16]

The only instance in the long and complicated history of the Tort Claims Act (see *Dalehite* v. *United States*, 346 U.S. 15, 24-30) where an explanation of the term punitive damages is given, indicates that this is the sense in which the term was understood by Congress.[17] At the Hearings conducted before the House Judiciary Committee during the Second Session of the 77th Congress, Assistant Attorney General Shea[18] testified:

---

[16] This definition of the term punitive damages agrees with the general law. *Restatement of the Law of Torts*, Section 908; Sedgwick, *Damages* (9th Ed., 1912), Sections 357, 363; Prosser, *Handbook of the Law of Torts* (2d Ed.), pp. 9-10; McCormick, *Handbook on the Law of Damages*, pp. 275, 280.

[17] The prohibition against punitive damages appeared for the first time in S. 2690 and H.R. 7236, 76th Cong., 1st Sess. These two bills had been drafted in the Department of Justice and submitted, at the request of Attorney General Murphy, by Senator Ashurst and Representative Celler. See *Annual Report of the Attorney General of the United States for the Fiscal Year ended 1939*, p. 8 and Holtzoff, *Tort Claims against the United States*, 25 Am. Bar Asso. Journ. 828, 831. Cursory references to the prohibition against the award of punitive damages appear frequently, see, *e.g.*, H. Rept. 2428, 76th Cong., 3rd Sess., p. 4; H. Rept. 2245, 77th Cong., 2d Sess., p. 9; H. Rept. 1287, 79th Cong., 1st Sess., p. 4; S. Rept. 1400, 79th Cong., 2d Sess., p. 32; Legislative Reorganization Act of 1946, House of Representatives, 79th Cong., 2d Sess., Committee Print, p. 37. The Tort Claims Act was enacted during the Second Session of the 79th Congress as Part IV of the Legislative Reorganization Act.

[18] As this Court pointed out in *United States* v. *Snelar*, 338 U.S. 217, 220, fn. 9, "the shape of the Federal Tort Claims Act was largely determined during its consideration in the course of the 77th Congress." The Court has frequently relied on the testimony

> And we think it is enough to satisfy the actual claim, rather than impose punitive damages on the United States.[19]

Mr. Shea thus envisaged punitive damages as damages *added* to the conventional compensatory damages and thought that the Government should not be saddled with that extra liability.

This prohibition against the award of punitive damages is not based on fiscal considerations alone; it also represents, we believe, a codification of the federal rule established in *Lake Shore, etc. Ry. Co.* v. *Prentice*, 147 U.S. 101, which holds that a vicariously liable master can be held responsible for punitive damages only if he had ratified or approved the intentional, wilful, wanton or outrageous act of his servant.[20] The possibility of such approval or ratification by the United States of the aggravation of a tort is hard to conceive, and in any event the Tort Claims Act was not designed to protect against intentional or wilful injuries. The rule against the award of punitive damages also suggests the related thought that the liability of the United States is not to be enhanced according to the type of fault of the Government employee. Indeed, 28 U.S.C. 2680(h) discloses the countervailing policy of completely exempting the United States from liability in many of

---

given by Mr. Shea during these hearings. See *United States* v. *Spelar*, 338 U.S. 217, 221; *Dalehite* v. *United States*, 346 U.S. 15, 27-30; *United States* v. *Gilman*, 347 U.S. 507, 511, fn. 2.

[19] Hearings before the Committee on the Judiciary, House of Representatives, 77th Cong., 2d Sess., on H.R. 5373 and H.R. 6463, Serial No. 13, p. 30.

[20] The federal rule has been adopted in many jurisdictions. See *Restatement of the Law of Torts*, Section 909; Prosser, *Handbook of the Law of Torts* (2d Ed.), pp. 11; 350, fn. 1; McCormick, *Handbook on the Law of Damages*, p. 282.

the instances of intentional torts in which punitive damages are most commonly awarded.

2. *The anomalous death statutes of Massachusetts and Alabama.* The administration of the punitive-damage exception of 28 U.S.C. 2674 was complicated by the circumstance that in two states, Massachusetts and Alabama, unusual methods prevail for the computation of damages in death cases and, in addition, that those two jurisdictions do not use the term "punitive damages" in the way in which these words are commonly applied.

The Massachusetts Death Act (*supra*, pp. 3-4) provides that if a person by his own negligence or his own wilful, wanton or reckless act or that of his agent or servant causes the death of another person, he shall be liable in damages. The statute prescribes a floor and a ceiling for those damages, and, except for the three-year period from January 1, 1947 to December 31, 1949, these damages have been assessed with reference to the degree of culpability of the defendant or his agents or servants.[21] The damages thus are computed without

[21] In 1943, a Special Commission to study the Method of Assessing Damages in Actions for Death recommended that damages in death cases should be based on the principle of compensation for the pecuniary loss sustained (Mass. Legislative Document, 1943, Senate No. 430). Presumably on the basis of that report, the Massachusetts Legislature amended the death Act in 1946 (Acts of 1946, Ch. 614), effective January 1, 1947, so as to provide for damages of not less than $2,000 nor more than $15,000, to be assessed with reference to the degree of culpability of the wrongdoer as well as to the pecuniary loss of the surviving spouse, children or next of kin. In order to remedy the confusion resulting from the two concurrent measures of damages, the act was amended in 1947 (Acts of 1947, Ch. 506), and made retroactively effective as of January 1, 1947 (Section 3), so as to eliminate the reference to the culpability of the wrongdoer. The provisions for a $2,000 floor and a $15,000 maximum, however, were retained. For the opera-

reference to the loss suffered either by the decedent's estate or his dependents, but solely on the basis of the tortfeasor's culpability which, according to the language of the Act, may extend from negligence to wilfulness.

The damages recoverable under the Massachusetts Death Act differ from the federal and general definition of punitive damages in two important aspects. First, true punitive damages are never awarded for the commission of a purely negligent tort; they presuppose an element of aggravation, *viz.*, outrageous, wilful, wanton, or malicious conduct. Cf. *supra*, pp. 16-17. The Massachusetts statute imposes liability for the negligent causation of death. Second, punitive damages, as the term is understood generally, are imposed in addition to, not in lieu of, compensatory or nominal damages. Cf. *supra*, pp. 16-17. The damages awarded under the Massachusetts statute are based exclusively upon the culpability of the wrongdoer. There are no basic compensatory damages to which punitive damages may be tacked.

Nevertheless, under the terminology prevailing in Massachusetts, the damages assessed under its Death Act are called "punitive" [22] on the ground that the re-

---

tion of this compensatory statute see *Beatty* v. *Fox*, 328 Mass. 216. As the result of Acts of 1949, Ch. 427, effective January 1, 1950, Massachusetts reverted to its traditional method of computing damages with reference to the culpability of the wrongdoer. The $2,000 and $15,000 limits were retained. *Massachusetts Law Quarterly*, October 1949, p. 3. See also *Turcotte* v. *DeWitt*, 124 N.E. 2d 241, 244 (Mass.). The ceiling on the recovery was raised to $20,000 in 1951. Acts of 1951, Ch. 250.

[22] When the Massachusetts courts call the damages recoverable under the Death Act "punitive" they probably use that term in the sense that the statute is penal or calls for a penalty. According to federal law (*supra*, p. 17, fn. 18), however, a statute is

covery, as in criminal cases, varies according to the fault of the wrongdoer. The greater the fault, the greater has been the sum recovered." *Boott Mills* v. *Boston & Maine Railroad*, 218 Mass. 582, 584; see also *Porter* v. *Sorell*, 280 Mass. 457, 460; *Arnold* v. *Jacobs*, 316 Mass. 81, 84.[23] On the other hand, as the court below pointed out (R. 30), many of the Massachusetts decisions are fully aware of the strong compensatory aspects of the Death Act. *Sullivan* v. *Hustis*, 237 Mass. 441; *Putnam* v. *Savage*, 244 Mass. 83; see also *Macchiaroli* v. *Howell*, 294 Mass. 144, 146-147 and *Arnold* v. *Jacobs*, 316 Mass. 81, 84.

The Alabama wrongful death statute, the Homicide Act (Alabama Code (1940), Title 7, § 123), provides for the recovery of "such damages as the jury may assess." The Alabama courts have interpreted this section as designed to preserve human life—not to compensate the survivors—and that the damages awarded

---

usually called penal only if it provides for an exaction designed to punish an offense against the public justice of the State and does not include damages, whether enhanced or not, which are payable to the injured person. *Huntington* v. *Attrill*, 146 U.S. 657, 673-674, 683; *Brady* v. *Daly*, 175 U.S. 148, 156; *Chattanooga Foundry* v. *Atlanta*, 203 U.S. 390, 397; *Helvering* v. *Mitchell*, 303 U.S. 391, 401-406; *Marcus* v. *Hess*, 317 U.S. 537; *Rex Trailer Co.* v. *United States*, 350 U.S. 148. Since the recovery under the Massachusetts Death Act goes to the family of the deceased, the persons presumably injured by the tort, the statute is not even technically penal in the normal federal sense. Cf. *Boston & Maine R.R.* v. *Hurd*, 108 Fed. 116, 119-123 (C.A. 1); *Loucks* v. *Standard Oil Co.*, 224 N.Y. 99, 102-106; *Hill* v. *Boston & Maine R.R.*, 77 N.H. 151; *Daury* v. *Ferrare*, 108 Conn. 386, holding that the Massachusetts Death Act is not penal in the international sense. See also Beale, *Treatise on the Conflict of Laws*, Section 611.2.

[23] In *Loucks* v. *Standard Oil Co.*, 224 N.Y. 99, 105, Cardozo, J., suggested that this emphasis may be due to the circumstance that the common law of Massachusetts does not award punitive or exemplary damages even for malicious torts. Cf. *Boott Mills* v. *Boston & Maine R.R.*, 218 Mass. 582, 589.

are punitive in nature, to be assessed according to the culpability of the wrongdoer. *Southern Ry. Co.* v. *Sherrill*, 232 Ala. 184, 193; *Louisville & Nashville R.R. Co.* v. *Davis*, 236 Ala. 191, 198; *Jack Cole, Inc.* v. *Walker*, 240 Ala. 683; *Constitution Pub. Co.* v. *Dale*, 164 F. 2d 210, 213-214 (C.A. 5).[24]

Possibly the most spectacular and least foreseeable consequence of this stress placed by the courts of Alabama and Massachusetts upon the punitive aspects of their Death and Homicide Acts occurred after World War I. Both states took the position that their death statutes were of a penal nature, and that actions for wrongful death resulting from the federal operation of the railroads, although maintainable in all other states, could not be brought in their jurisdictions under the rule of *Missouri Pacific R.R. Co.* v. *Ault*, 256 U.S. 554, 564. *Arruda* v. *Director General of Railroads*, 251 Mass. 255; *Howard* v. *Davis*, 209 Ala. 113, 114.[25]

---

[24] Cf., however, the analysis by this Court of the Alabama Homicide Act in *Pizitz Co.* v. *Yeldell*, 274 U.S. 112.

[25] The Massachusetts court conceded that in all likelihood "the exclusion of the United States in its operation of railroads from liability like that sought to be enforced in the present action was an oversight or unintentional. We cannot supply a *casus omissus*". 251 Mass. at 263. The Supreme Court of Alabama also decided to stress the penal aspects of its Homicide Act, and concluded "we must bow to the highest authority in deciding federal questions, and 'Render, therefore, unto Caesar the things which are Caesar's'." *Howard* v. *Davis*, 209 Ala. 113, 114. The Supreme Court of Missouri, however, was less overawed by the particular character of the remedy contained in its Railroad Death Statute. Until its repeal in 1955, that statute (Vernon's Annotated Missouri Statutes §537.070) provided that where death has been caused by the negligence of a railroad or similar public conveyance it "shall forfeit and pay as a penalty * * * the sum of not less than two thousand dollars, and not exceeding ten thousand dollars, in the discretion of the jury." The court did not consider decisive the extremely penal-sounding language of the statute (cf. *Marcus* v. *Hess*, 317 U.S.

B. *The Enactment of 28 U.S.C. 2674(2).*

After the adoption of the Tort Claims Act, several United States Attorneys, relying on the local usage of the term "punitive damages" in Alabama and Massachusetts,[26] moved to dismiss death actions brought in those two jurisdictions against the United States.[27] The Department of Justice agreed that it was desirable to obtain judicial clarification by testing the scope of the exemption of the United States from punitive damages.

When Congress was advised of this controversy, two

537, 551; *Atchison, T. & S. F. Ry. Co.* v. *Nichols*, 264 U.S. 348, 350-352, nor the alleged "purely penal" aspects of the statute, but found that it contained sufficient compensatory elements to permit a recovery against the Director General of Railroads. *McDaniel* v. *Hines*, 292 Mo. 401, 415-419.

[26] The adoption of a compensatory death statute in Massachusetts (*supra*, p. 19, fn. 21) did not entirely moot the issue as far as that state was concerned. That statute covered deaths occurring after January 1, 1947 (p. 19, fn. 21). The Tort Claims Act, however, is applicable to claims accruing on or after January 1, 1945 (28 U.S.C. 1346(b)). Thus, the problem remained alive with respect to deaths occurring during that two-year interval, and it resumed its importance when Massachusetts returned to its old method of assessing damages in death cases, on January 1, 1950.

[27] Petitioner has stated that the Railroad Death Statutes of Colorado, Missouri and New Mexico raise analogous problems. The Missouri and New Mexico Statutes (Vernon's Annotated Missouri Statutes, §537.070 and New Mexico Stat. Ann. (1953), §22-20-4) have both been construed as being of a compensatory nature. *McDaniel* v. *Hines*, 292 Mo. 401; *Atchison, T. & S. F. Ry. Co.* v. *Nichols*, 264 U.S. 348. Moreover, the Missouri statute was repealed in 1955. The New Mexico statute was amended in the same year and now provides for "damages compensatory and exemplary" without any limitation in amount. With respect to the Colorado statute (Colorado Rev. Stats. 1953, §41-1-1), see *Hopper* v. *Denver & R.G.R. Co.*, 155 Fed. 273 (C.A. 8), pointing to the fact that the Colorado statute was derived from the Missouri legislation—later interpreted as being compensatory in nature, see *supra*,—and hinting strongly that the Colorado statute was compensatory, at least in the international law sense (cf. the citations at 155 Fed. 277-278).

bills were immediately introduced in the House of Representatives. H.R. 3668, 80th Cong., 1st Sess., proposed to add a proviso to Section 410(a) of the original Tort Claims Act (now 28 U.S.C. 2674(1)) to the effect that where in death cases the applicable state law provided only for punitive damages the United States should be liable for such damages.[28] H.R. 3690 was more radical; it proposed to repeal altogether the prohibition against the award of punitive damages.

Hearings were held on these bills before a Subcommittee of the House Judiciary Committee, to which the members of the Congressional delegations from Alabama and Massachusetts were invited.[29] During a discussion of the Massachusetts law, it was pointed out that the Massachusetts Death Act has been construed to be punitive in some aspects and compensatory in others (App., *infra*, pp. 46, 48, 52); it was also disclosed that the Act provided for a maximum recovery (App., *infra*, pp. 45, 55).[30]

As to the merits, it was fully recognized that Congress had not intended to preclude governmental liability in death cases governed by the laws of Alabama and Massachusetts (App., *infra*, pp. 36, 41, 44, 50, 53, 55). Some Congressmen indicated that Alabama apparently used the term "punitive damages" in an entirely different way from Congress when it enacted 28

---

[28] A spokesman for the Department of Justice favored the adoption of this bill (App., *infra*, p. 49). A similar bill was introduced in the Senate: S. 1224, 80th Congress, 1st Session.

[29] The hearings were not printed. Pertinent excerpts may be found in the Appendix, *infra*, pp. 35-60.

[30] The Committee was not advised of the 1946 and 1947 amendments to the Massachusetts Death Statute (see *supra*, p. 19, fn. 21) which had changed the theory of recovery from punishment to compensation (App., *infra*, pp. 45-48). See also the statement of Representative Lane, *infra*, at App. 53.

U.S.C. 2674 (App., *infra*, pp. 41, 50). While there was agreement that the situation should be remedied, there was some hesitancy to make the United States liable for punitive damages (App., *infra*, pp. 43-44, 54, 56), and it was pointed out by Rep. Gwynne, the Chairman of the Subcommittee, that an employer's vicarious liability ordinarily is limited to compensatory damages (App., *infra*, pp. 43-44).

At this juncture, a representative of the General Accounting Office suggested an amendment to H.R. 3068 which would resolve the conflicting considerations. He recommended that, where the applicable law provided punitive damages in the case of wrongful death, the United States should be liable for actual or compensatory damages in lieu thereof. App., *infra*, pp. 56-57. This recommendation constitutes the basis of the present 28 U.S.C. 2674(2).[31] At the end of the hearings, Congressman Bryson summed up the consensus of the Committee by stating (App., *infra*, p. 59):

> We want to do right by Alabama and Massachusetts, but we do not want to give them a privileged status over the other states.

The pertinent Committee reports reflect the same considerations. H. Rept. 748, 80th Cong., 1st Sess.; S. Rept. 763, 80th Cong., 1st Sess. They state that the purpose of the prohibition against the award of punitive damages was to limit the liability of the United

[31] The Senate Committee (S. Rept. 763, 80th Cong., 1st Sess.) clarified this formula by specifying that these actual or compensatory damages should be measured by the pecuniary injuries suffered by the survivors, *i.e.*, not by the loss to the decedent's estate, an alternate method of computing damages in death cases. Cf. McCormick, *Handbook on the Law of Damages*, 337-345; *Development in the Law of Damages, 1935-1947*, 61 Harvard L. Review 113, 167. *Heath* v. *United States*, 85 F. Supp. 196, 199 (N.D. Ala.).

States to compensation for the loss actually suffered rather than to punish for the culpability of the tort and that, unexpectedly, this congressional purpose had resulted in "inequity" in death cases governed by the laws of Alabama and Massachusetts, because in those states the death statutes had been construed as being punitive in nature. The reports explain that it was the purpose of the proposed bill to remove that "inequity" by amending

> * * * the Federal Tort Claims Act so that it shall grant to the people of two States the right of action already granted to the people of the other 46.

The reports conclude that the proposed bill would not authorize the infliction of punitive damages against the Government but that its

> * * * passage will remove an unjust discrimination never intended, but which works a complete denial of remedy for wrongful homicide.

The scope of the 1947 amendment to the Tort Claims Act was thus limited to the apparent conflict between the prohibition in 28 U.S.C. 2674(1) against the award of punitive damages against the United States and the classification of death awards as punitive in Massachusetts and Alabama.[32] Its purpose was to permit

[32] Parenthetically, it may be questioned whether the enactment of 28 U.S.C. 2674(2) was really necessary. The courts could have held that the prohibition against punitive damages was not aimed at denying relief to claims based on Alabama or Massachusetts law, especially since the damages assessed in those jurisdictions were not punitive in the federal sense. See *supra*, pp. 24-25, and see the remarks of Congressmen Gwynne and Walter, App., *infra*, pp. 41, 50). On the other hand, Congress was faced with a degree of urgency. At least one district judge in Alabama had indicated that he would dismiss a death action brought against the United States (App., *infra*, p. 50; see also pp. 39, 49).

recovery in death actions governed by the laws of Alabama and Massachusetts and thus to prevent a repetition of the unfortunate situation which prevailed in Alabama and Massachusetts after World War I (see *supra*, p. 22).

On the other hand, there is no indication that Congress sought to nullify, in cases arising under the Tort Claims Act, the Massachusetts limitation on the amount of recoveries, of which the Committee had been advised (App., *infra*, pp. 55, 45-46). Representative Bryson's statement (*supra*, p. 25):

> We want to do right by Alabama and Massachusetts, but we do not want to give them a privileged status over the other states.

and the committee reports, stating that the sole purpose of the bill was to remove "an unjust discrimination, never intended," both belie petitioners' theory that Congress deliberately and carefully eliminated the ceiling on the amount of the recovery in Massachusetts death cases, thereby exposing the United States to liability far in excess of that of a private individual in like circumstances, while leaving those ceilings in effect in the remaining fourteen jurisdictions which have similar restrictions but provide for compensatory damages.

III

Having Been Enacted for the Sole Purpose of Enabling Recoveries in Death Cases Governed by the Laws of Alabama and Massachusetts, 28 U.S.C. 2674(2) Neither Provides for, Nor Requires, the Disregard of State Limitations upon the Amount Recoverable.

Petitioners' basic position is that the wording of 28 U.S.C. 2674(2) requires that the limitation on the

amount of recovery contained in the Massachusetts Death Act be disregarded in an action brought under the Federal Tort Claims Act. We have shown that this result is irreconcilable with the specific purpose of the provision as revealed by the legislative history. This inquiry into legislative history was highly pertinent, and indeed required in a case of this character. This Court has often recognized that it is imperative in view of the "disorderly conduct of words"[33] to determine whether the statutory language actually represents the legislative purpose and meaning.[34] Apart from this, moreover, petitioners' theories are not supported by the statutory terms in their context.

A. *28 U.S.C. 2674(2) refers only to the Measure of Damages, Not to the Extent of the Recovery.*

To recall its terms, 28 U.S.C. 2674(2) provides that where, according to the applicable law, damages only punitive in nature are awarded in death cases, the United States shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death to the persons for whose benefit the action was brought in lieu thereof. Petitioners read this section as if it were worded "*full* actual or compensatory damages" or "actual or compensatory damages *without abatement* in respect to the amount for which recovery is authorized." (Emphasis added).[35]

---

[33] Chafee, The *Disorderly Conduct of Words*, (1941) 41 Columbia Law Review 381.

[34] *United States* v. *American Trucking Associations*, 310 U.S. 534, 543, 544; *United States* v. *Dickerson*, 310 U.S. 554, 561-562; *United States* v. *Fisher*, 2 Cranch 358, 386, see also the dissenting opinion of Frankfurter, J. in *Knauff* v. *Shaughnessy*, 338 U.S. 537, 548, and Frankfurter, *supra*, p. 16, fn. 14, at 528, 536, 537-544.

[35] Cf. Death on High Seas Act, Section 4, 41 Stat. 537, 46 U.S.C. 764, which uses the latter expression. See *infra*, p. 32.

This argument, however, ignores the cardinal fact that the damage clause of the Massachusetts Death Act contains two separate elements: (1) the theory upon which the recovery is based, *i.e.*, the measure of damages or the *manner* of liability, and (2) the maximum recovery, *i.e.*, the *extent* of the recovery. Other death statutes make similar distinctions between those two factors.[36] New Hampshire, indeed, highlights this dichotomy by assigning separate code sections to those two elements.[37]

28 U.S.C. 2674(2) is concerned only with the theory or *manner* of recovery, *i.e.*, the subsection substitutes compensatory for punitive damages. It leaves undisturbed all other aspects of the state law—including the *extent* of the recovery, the maximum permissible recovery. As we have seen, this reading of the statute is fully supported by the legislative history of the Tort Act and by the purpose which the 1947 Amendment was designed to serve. Moreover, it is plain from the Death on High Seas Act that Congress knows well how to express itself where it actually seeks to eliminate restrictions on the amount of recovery. See fn. 35, *supra*, p. 28; *infra*, p. 32.

B. *The Change of the Theory of Recovery Does Not Require the Elimination of the Ceiling on the Recovery.*

Petitioners take the position that the $20,000 ceiling, especially in its combination with the $2,000 minimum

---

[36] See, *e.g.*, Laws of Alaska, 1955, Ch. 153, amending Alaska Compiled Laws Annotated, 1949, § 61-7-3; Maine Revised Statutes, 1954, Ch. 165, §10; Minnesota Statutes Annotated, §573.02, as amended by Laws of 1951, c. 697, § 1 and Laws of 1955, c. 407, §1.

[37] New Hampshire Rev. Stat. Ann. (1955), §556:12, and §556:13.

recovery, is so closely connected with the punitive character of the statute that it is inconsistent with the award of damages on a compensatory basis. The obvious answer to the argument that ceilings and minima on tort judgments are inconsistent with a compensatory theory of recovery is furnished by the example of Massachusetts itself. During the three years during which damages in that state were awarded *with reference to the pecuniary loss of the survivors, i.e.,* on a compensatory basis, judgments for wrongful death were subject to the same ceiling and floor as before and after that time, when recovery was of a punitive nature.[38]

The former Missouri Railroad Death statute, which was construed by the Supreme Court of Missouri to be at least in part compensatory, also contained a floor and ceiling on recovery. See *supra*, p. 22, fn. 25. Most instructive is the decision in *Atchison, T. & S. F. Ry Co.* v. *Nichols*, 264 U.S. 348, arising under the former New Mexico statute (see *supra*, p. 23, fn. 27), under which a railroad responsible for wrongful death:

> * * * shall forfeit and pay for every person or passenger so dying, the sum of five thousand dollars, * * *.

This Court held that the New Mexico statute was compensatory, in spite of the limitation of the recovery to the flat sum of $5,000. It pointed out that this feature of the statute constituted a legislative definition of the damages in view of (264 U.S. at 352):

> * * * the incapability of precise accuracy being attained either by court or jury of the damages

[38] Cf. *supra*, p. [illegible], fn. [illegible]; see also *Beatty* v. *Fox*, 328 Mass. 216.

that may result from the death of a person to surviving relatives.

The $2,000-$20,000 bracket provided by the Massachusetts legislature presumably prescribes similar guidance.[39]

The total lack of correlation between limitations on the extent of damages and the theory of recovery is demonstrated by the contrast between the fourteen jurisdictions which award compensatory damages for wrongful death, and also impose limits on the amount of the recovery,[40] with the punitive damages awarded in Alabama which are not subject to any floor or ceiling. Our conclusion is that limitations on the amount of recovery are not so close an attribute of punitive damages that they must have fallen when Congress changed the theory of recovery for torts committed by the Federal Government in Massachusetts.[41]

---

[39] As to some Massachusetts decisions which seek to infer the quasi-criminal character of the Massachusetts Death Act from the very existence of limitations upon the assessable damages (cf., *e.g.*, *Porter* v. *Sorell*, 280 Mass. 457, 461; *Arnold* v. *Jacobs*, 316 Mass. 81, 84), see in general the warning of Cardozo, J., in *Loucks* v. *Standard Oil Co.*, 224 N.Y. 99, 104-106, against placing too much trust on the "undue" emphasis put by the Massachusetts courts on the penal elements of their Death Act.

[40] *Supra*, p. 13, fn. 10.

[41] Nor can it be said that there is anything inherently punitive about the amount of the $20,000 ceiling of the Massachusetts Death Act. To the contrary, it is well within the range of the maximum recoveries existing in the fourteen compensatory damage jurisdictions (*supra*, p. 13, fn. 10).

C. The Absence of Limitations on the Amount Recoverable for Wrongful Death in Admiralty Does Not Support Petitioners' Interpretation of 28 U.S.C. 2674(2).

Petitioners, finally, take the position that their thesis is in accord with a supposed federal policy against limitations on the amount of the recovery in death cases, manifested especially in the field of admiralty. The absence of ceilings on death claims in maritime and related cases, however, is based upon the express clause of Section 4 of the Death on High Seas Act (41 Stat. 537, 46 U.S.C. 764) that recovery may be had "without abatement in respect to the amount for which recovery is authorized". Such language is conspicuously missing from 28 U.S.C. 2674(2). See *supra*, p. 28. Moreover, under the Tort Claims Act, the United States has deferred to the law of the place where the tort was committed, *i.e.*, to state law, and general federal policies in other fields and established for other purposes are not controlling or even helpful. [42]

Petitioners also seek to buttress their position by claiming that Congress deliberately abrogated the limit on recovery in Massachusetts death cases because, they say, that state has no general public policy against the award of unlimited compensatory damages for wrongful death; its courts award full compensatory damages in cases governed by the laws of other states. This

---

[42] Actually, petitioners' argument proves too much. It could be argued with the same justification that under the Tort Claims Act the rule of contributory negligence is inapplicable because the rule of comparable negligence prevails generally in admiralty and has been adopted expressly in the Federal Employers Liability Act, Section 3, 35 Stat. 66, 45 U.S.C. 53, and consequently in the Jones Act (41 Stat. 1007, 46 U.S.C. 688).

argument would be valid only if this Massachusetts rule were unique, and if the fourteen other jurisdictions which limit their awards in death cases—which limitations are fully effective under the Tort Claims Act—would apply their ceilings on recoveries to death cases based upon the laws of other states. Actually, however, the Massachusetts law merely represents the prevailing conflicts rule that in an action for wrongful death the forum will apply the law of the place where the tort was committed, including the governing limitations, if any, on the amount of the recovery. *Northern Pacific Railroad v. Babcock*, 154 U.S. 190, 196-199; *Stoll v. Burlington Transportation Co.*, 178 F. 2d 511, 515 (C.A. 10), certiorari denied, 339 U.S. 929; 191 F. 2d 915, 917; *Zirkelbach v. Decatur Cartage Co.*, 119 F. Supp. 753 (N.D. Ind.); *Barnes v. Union Pacific R.R. Co.*, 139 F. Supp. 198, 200 (D. Idaho); *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 108-112; *Hanna v. Grand Trunk Ry. Co.*, 41 Ill. App. 116, 130; *Restatement of the Law of Conflicts of Laws*, Section 417; see also *Annotation*, 15 A.L.R. 2d 762, 765-767.

Petitioners thus have been unable to give any plausible explanation for their contention that the congressional aim to remove an unintended discrimination against Alabama and Massachusetts (see *supra*, pp. 21-26) had the additional effect of singling out Massachusetts by permitting in that jurisdiction—and in that jurisdiction alone—a recovery against the United States much higher than the one to which the actual tortfeasor and his employer (if he were a private person) could be subjected.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
PAUL A. SWEENEY,
HERMAN MARCUSE,
Attorneys.

SEPTEMBER 1956.

APPENDIX

HEARINGS ON H.R. 3668 AND 3690, 80TH CONGRESS [1]

A Bill to amend the Federal Tort Claims Act

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE NO. 2 [2]

Wednesday, June 11, 1947.

The Subcommittee met at 10:00 o'clock, Honorable John W. Gwynne, Chairman, presiding.

Mr. GWYNNE: The Subcommittee will be in order, please.

We are considering today several bills having to do with amendments to the Tort Claims Act. They are H.R. 3690; H.R. 3668. In addition, we have H.R. 42, on a slightly different suggested amendment.

* * * * *

STATEMENT OF THE HONORABLE SAM HOBBS, REPRESENTATIVE FROM ALABAMA

Mr. HOBBS: Mr. Chairman, I am not unmindful of the fact that when I asked you to grant us a hearing at the earliest possible moment, I promised not to take over ten minutes for [p. 2] this whole issue. So I will try to be as brief as I can.

Mr. Grant has a bill, H.R. 3668, which will serve the needs of Alabama and Massachusetts all right, because it is limited to them by its terminology; whereas my

[1] These hearings were not printed. A typewritten copy is in the custody of the Judiciary Committee of the House of Representatives.

[2] This Subcommittee was composed of Representative Gwynne, Chairman, and Representatives Case, Walter, Bryson and Lane, Members. United States Code Congressional Service, 80th Cong., 1st Sess. (1947), p. LXXVII [footnote added]

bill is aimed at taking care of the needs of all 11 states which would be crippled in the enforcement of their claims were this punitive damage provision not straightened out. The idea is, of course, that Kentucky, Missouri, Montana, Nevada, New Mexico, South Carolina, Texas, Virginia and West Virginia recognized by their statute and approved both compensatory and punitive damages. They can be recovered. So, in those states, they are crippled only halfway. There is only one of their legs cut off. But I think their situation ought to be recognized, and not simply that of Massachusetts and Alabama, where both legs are cut off.

By the Tort Claims Act, Congress has interdicted any resort to private bill. Therefore, we are remedyless, unless this provision is stricken one way or another, either specifically to correct the dire need of Alabama and Massachusetts, or in the broader way. So it does not make a bit of difference to us, gentlemen, which bill is adopted, so long as one is.

But I submit that to outlaw punitive damages is the height of asininity. The more great and venal the sin, there ought to be, certainly, no lessening by reason of that [p. 3] fact of the damages awarded for that sin.

I have talked to Mr. Monroney, the author of the bill in the House. I have talked to Mr. Celler, who is the author of the bill before it was adopted by the Reorganization Bill Committee. Both of them say, "Why, of course, we never had any idea of doing anything such as has been the result for both Massachusetts and Alabama."

These states, speaking through their courts of last resort, have said that it makes no difference whether a man is a ditchdigger or the president of the State University, he has a right to live, and anyone who slaughters him negligently and wrongfully ought to be mulct in damages for their wrong, for their sin. And

if it is compensable on the basis of a calculation of the earning capacity of the one slaughtered wrongfully, you put the premium on the amount of money that the dead man lost, and his family, instead of putting the premium on human life.

So, following that logic through a long line of decisions, Alabama and Massachusetts take the position, through their courts of last resort, that the purpose of this statute, which is called the Homicide Act, is to prevent unlawful taking of human life, no matter if it be a big man or a little man, so far as earning capacity is concerned. And we submit that if you can recover if you stump your toe and are laid off from work for a day, by the same taken, if they kill [p. 4] you unlawfully there ought to be some payment and some balm in Gilead. There is not now.

Mr. WALTER: Now, I notice in H.R. 3690 this language, that the compensation for injury, death, and so on, is in accordance with the law of the place where the act or omission occurred.

Mr. HOBBS: That is right.

Mr. WALTER: Is that not the law today?

Mr. GWYNNE: The only difference, I believe, is to strike out the words "or for punitive damages."

Mr. HOBBS: That is right. In other words, it is not that part of the law to which we object; but the fact that that is in there makes it subject to the Massachusetts and Alabama interpretation of their statutes, and it makes it so that for the other nine states it cut off one of their legs. It cut off both of ours.

May I say this before I close. We have a united Alabama delegation, of course, back of either of these bills that will effect this ultimate purpose. In addition to that, we have a united Massachusetts delegation, and at least one man who has expressed himself personally to me, who is vitally interested from the standpoint of

each of these other nine states. Our delegation is here, as you see, and each one of them would like to say something, but I think it is not necessary to have them testify.

[p. 5] Mr. WALTER. Two of the nine delegates are from Massachusetts.

Mr. GWYNNE: I am not clear just what the situation is in Massachusetts and Alabama. Do you mean that under their statutes recovery cannot be had for punitive damages for unlawful death?

Mr. HOBBS: No. No compensatory damages can be recovered, but only punitive. They take the position that human life is precious, no matter how humble that may be, to the person who indulges in the privilege of living, and that, therefore, you ought not to limit it to the amount of money that he might earn if he were allowed to live.

We take the position, which I think is the enlightened one, that no matter how humble, a man has a right to live, and that anyone who wrongfully deprives him of that should be held liable in damages.

Mr. GWYNNE: That is the law in your states?

Mr. HOBBS: That is the law in our states.

Mr. GWYNNE: How do you measure the damages?

Mr. HOBBS: The statute in Alabama says that the jury may award such damages as they think right. In Massachusetts it is "just and fair," I think. But in these other nine states they have substantially copied our language and compensatory damages are allowed for the loss of time and so on.

Mr. GWYNNE: In other words, recovery is possible in your [p. 6] state for wrongful death, but you do not make the distinction that is made in many jurisdictions between what might be said to be compensatory damages and punitive damages.

Mr. HOBBS: We specifically say that no compensatory damages can be recovered, but only punitive damages.

Mr. GWYNNE: Your statute calls that punitive damages?

Mr. HOBBS: Yes, sir. And I will insert in my extension of remarks the decision and quote from them. It is perfectly clear. And the same thing is true in Massachusetts.

Mr. GWYNNE: In other words, Mr. Hobbs, as I understand it, under this law, if suit were being tried against the Government for the wrongful death of an individual, the courts following your law could give no damage whatsoever for the wrongful death.

Mr. HOBBS: None at all—that is, under this Tort Claims Act.

Mr. GWYNNE: That is the situation in Massachusetts?

Mr. HOBBS: Yes.

Mr. GWYNNE: What is the situation in some of these other states—for instance, in Virginia?

Mr. HOBBS: In Virginia if a man is injured and laid up for a week, he can recover the compensatory damages. But if the jury says, "Well, that is a mere minor thing. But this is such a horrible case of negligence—they ran him down and killed him"—you can recover only the compensatory damages: [p. 7] but not a cent of punitive damages.

Now, the illustration—the proof of the pudding is in the eating—the first case in the United States has arisen in Alabama, where Judge John McDuffy wrote me that he had a demurrer there that he had to sustain because there was no possibility—by the way, he served here for 25 years and only missed being Speaker by three votes.

Mr. WALTER: I seconded his nomination.

Mr. HOBBS: I know you did.

He said there was no escape, under the law of Alabama, from having to knock that case into a cocked hat.

although it was one of the most horrible admitted cases of negligence. He is holding that up to see if we cannot give Alabama its day in court for death cases.

Mr. LANE: The wording of the three bills is different. Have you agreed on one bill?

Mr. HOBBS: It doesn't make any difference—either one of them—Mr. Grant's bill or mine.

Mr. GWYNNE: I wonder if I can say, for the benefit of the members who have come in, that the Celler bill is on an entirely different subject. I merely suggested that some of the witnesses might want to say a word about it.

Mr. HOBBS: How does that work out in your own state? In your state, that does not prevent a man from getting damages from a private individual, does it?

[p. 8] Mr. HOBBS: It eliminates the possibility of any proof as to how much money this poor devil that was killed wrongfully would have made. It says to the jury, and the Court charges under this law, the purpose of which was to prevent homicide, "The state takes the position that you and you alone, as the sole judges of the facts, should award such damages as you think fair and just."

STATEMENT OF THE HONORABLE ALBERT RAINS, REPRESENTATIVE FROM ALABAMA

Mr. RAINS: You say that the statute in Alabama says that the jury, under instruction from the Court, shall find such damages for the death as to them, in their good conscience, should seem right and just. Over the long years of rulings in the Supreme Court, they have so defined that to mean that all damages awarded in case of death are in the nature of punitive damages; and further, they accept another charge which says that no damages can be awarded except in the nature of a fine against the man.

Mr. WALTER: Is it not relevant to show what the decedent was earning?

Mr. RAINS: It is not. Under the Reorganization Act, and since the case is tried under the law where the death occurred, the Federal judge, of course, is obliged to rule on the demurrers to the effect that, since only punitive damages can be collected, and since he is dead, his earnings [p. 9] are not relevant.

Mr. WALTER: Are the Carlyle Tables relevant?

Mr. RAINS: No.

Mr. WALTER: The jury just reaches out into thin air and says, "This is the amount"?

Mr. RAINS: Yes.

Mr. HOBBS: The degree of culpability of the individual——

Mr. GWYNNE (interposing): Is not the difficulty that, I think the words "punitive damages" were probably used in a different sense than you have been using them in Alabama?

Mr. HOBBS: Yes, and it was a Simon Pure mistake.

Mr. BRYSON: The jury decides what it is to be, and that is what is given.

Mr. HOBBS: Yes.

Judge Alexander Holtzoff, before he was appointed judge, was the man charged by the Department of Justice with the briefing of this bill, and he has written several very informative articles on it, and in one of his treatises on it he discusses the very point that you had in mind in asking this last question.

When he was asked if the elimination of the punitive damage provision would work any hardship on the defendants, his reply was that many states, and more all the time, are coming into that field and had waived their immunity from suit, from punitive damages, and with no results that were [p. 10] adverse to the state. In other words, he thinks the jury renders the same ver-

dict conscientiously, no matter whether immunity is waived and punitive damages are recoverable or not.

Mr. GWYNNE: Is that all, Mr. Hobbs? You might put that in the record.

Mr. HOBBS: Yes.

Mr. GWYNNE: Mr. Grant!

STATEMENT OF THE HONORABLE GEORGE M. GRANT, REPRESENTATIVE FROM ALABAMA

Mr. GRANT: Mr. Chairman and gentlemen of the Committee:

I had the Legislative Reference Service prepare a brief of the law in each of the 47 states, and I think it would be helpful to the Committee in considering this, and I would like leave to file this with the Committee.

Mr. GWYNNE: That will be filed.

* * * * *

[p. 11] Mr. GRANT: I might say that this was brought to my attention that some months ago a person was killed in my district, and, naturally, under the Legislative Reorganization Act of 1946—and I might say in passing that I dare say there is not a member of Congress who knew about this or thought about it at the time—and the attorney representing the estate filed a bill in the District Court, as provided in the Legislative Reorganization Act, and, of course, he finds himself out of court.

A few weeks after that the same thing happened in my district where there was an old colored man riding a mule down the road, and an Army truck left the highway, hit the mule and the old colored man and killed both of them. The Government paid for the mule, but the estate has no resort in collecting anything for the old man's death.

Mr. WALTER: Would the enactment of this make the states actionable for punitive damages?

Mr. GRANT: No. It is governed by the law of the state, and is so set out in the Reorganization Act.

Mr. WALTER: As I recall the Tort Act, the United States is relieved from punitive damages. I am just wondering whether or not—and after all, that was written in there for a purpose—I am wondering whether or not the enactment of either of these bills would increase the liability of the United States.

[p. 12] Mr. RAINS: It is limited only in any case where the law of the place where the act or omission occurred limited it. That was limited only to these states.

Mr. WALTER: But the Hobbs bill amends that. On Line 14, Page 2, after the comma, it states: "except that the United States shall not be liable for interest prior to judgment."

Under existing law, as I recall it, after "judgment" is contained this language, "or for punitive damages."

Mr. HOBBS: That is right.

Mr. WALTER: This amends it by striking out those four words.

Mr. HOBBS: That would make a general application and would increase the possible liability.

Mr. WALTER: Throughout the United States?

Mr. HOBBS: Throughout the United States, of the Government in every case, which I maintain is the righteous and the only way. The Government ought not to hide behind its immunity where the wrong was committed wantonly or wilfully, and that is what punitive damages are liable for.

Mr. GWYNNE: Is there not this distinction: Hasn't it been made in many cases, that punitive damages are meant to punish the person who did the wrong? Hasn't there been some limitation on punitive damages against corporations?

Mr. HOBBS: I do not think so.

Mr. WALTER: Yes, and employers.

[p. 13] Mr. GWYNNE: In some cases they have restricted the right of recovery of punitive damages against a corporation, whereas they may be assessed against the individual.

Mr. HOBBS: So far as I know, I have never heard of any such doctrine or decision.

Mr. GWYNNE: Go ahead, Mr. Grant.

Mr. GRANT: Of course, the legislative Reorganization Act provides that the Government shall be liable under circumstances where a private person would be liable to the claimant for such damages in accordance with the law of the place where the act or omission occurred. Of course, my bill would not change that.

To bring this matter to the attention of the Committee and Congress, at the same time I filed H. R. 3668 I filed a private relief bill. Of course, I knew at that time that the Committee could not consider the bill and would have to turn it down. But, at the same time, I hoped that it could be filed and the Committee would do that to show that we were entitled to relief somewhere. But, the Parliamentarian returned this bill to me and said I could not file it. I asked him if he could mark it "Not Filed," and he said, "No."

So that is where we stand. We cannot file a bill for relief—a private bill—because that is barred by the statute, and we are out of court when a bill is filed in the District Court where the act took place or the district in which the [p. 14] plaintiff resides. And, frankly, I do not believe it was the intention of Congress to bar citizens of the state of Alabama and the state of Massachusetts from having relief.

One might say that it is the state's fault. That might be true. But, at the same time, the Federal Government—we here in Congress—have changed the law, and

I believe the wrong has been done, and I trust that you gentlemen can report one of our bills out favorably.

Mr. GWYNNE: Are there any questions?

Who is the next witness?

Mr. HOBBS: As I have stated, the entire delegation is here and every one of them would like to be heard. There are several from Massachusetts. Mr. John McCormack and Mr. Philbin both spoke to me and I told them I did not think it was necessary for them to come. But they take the position very strongly that we have tried to indicate to you today.

Mr. GOODWIN: In connection with the legislation, Congressman Bates asked me to say that he could not come in and asked that he might be recorded as in favor of it.

I notice also that Congressman Heselton and Congressman Donohue are here, and Congressman Lane, of course.

Mr. GWYNNE: Would Congressman Heselton and Congressman Donohue like to say a few words?

STATEMENT OF THE HONORABLE HAROLD D. DONOHUE, REPRESENTATIVE FROM MASSACHUSETTS

[p. 15] Mr. DONOHUE: It might be interesting to the Committee, we have in Massachusetts a section of the law entitled "Chapter 229: Actions for Deaths and Injuries Resulting in Death."

I call your attention to Section 5, which reads as follows:

(Chapter 229, Section 5, General Laws of Massachusetts to be inserted at this point.)

Actions for Death and Injuries Resulting in Death.

GENERAL LAWS OF MASSACHUSETTS

CHAPTER 229

Section 5. Action for Death in General—Except as provided in sections one, two and three, a person who

by his negligence or by his wilful, wanton or reckless act, or by the negligence or wilful, wanton or reckless act of his agents or servants while engaged in his business, causes the death of a person in the exercise of due care, who is not in his employment or service, shall be liable in damages in the sum of not less than five hundred nor more than ten thousand, dollars to be assessed with reference to the degree of his culpability or of that of his agents or servants, to be recovered in an action of tort, commenced, except as provided by section four of chapter two hundred and sixty, within two years after the injury which caused the death by the executor or administrator of the deceased, to be distributed as provided in section one. (1897, 416; 1898, 565; R. L. 171, #2; 1907, 375; 1922, 439; 1925, 346, #9).[44]

* * * * *

[p. 16] Mr. Gwynne: Under the construction given that statute, if some agent of the Government killed someone wrongfully in Massachusetts could the estate recover?

Mr. DONOHUE: Not under the Federal Tort Claim Act, as it exists.

Mr. GWYNNE: Have you any cases?

Mr. DONOHUE: Yes. This section—the section I have just read, giving a right of action for death by negligence of one not in the defendant's employ or service conforms, in the main, to the policy of the Commonwealth respecting remedy for death, which is, in some aspects, punitive and in some aspects compensatory and remedial, and it cites Putnam v. Savage, 244 Mass.,

[44] Note that this text of the Massachusetts Death Act does not contain any amendments subsequent to 1925, especially not the amendments of 1946 and 1947 under which the theory of recovery became compensatory. [Footnote added].

83, cited in 138 N.E. Report 808, 61 ALR 839, and it goes on to say:

"This is not recoverable under [redacted] section, but is a penalty to punish the wrongdoer. It is, in substance, a fine imposed by the Commonwealth for the offense of causing loss of human life through negligence, which, instead of being turned into the Treasury of the Commonwealth, is paid one-half to the widow and one-half to the minor children."

If there is no widow the whole amount goes to the next of kin.

Mr. GWYNNE: I had particular reference as to how your courts construed the Tort Claim Act.

Mr. DONOHUE: We have not had the cases.

[p. 17] Mr. GWYNNE: But you think, in view of its decisions, they would probably hold the same as the court in Alabama has held?

Mr. DONOHUE: I would say so. In fact, from these decisions that have come down, they have given the interpretation to that section of the law as being punitive in nature, and, in view of the wording of the Federal Tort Claims Act; the Federal Government, in the event that one of its employees caused the person to be killed up there, they just could not recover under the interpretation given our law.

Mr. GWYNNE: And you think that the bill introduced by Mr. Grant would remedy the peculiar situation in your states?

Mr. DONOHUE: I regret to say that I have not read the bill.

Mr. GWYNNE: There are two bills here, and Mr. Grant's bill is the much shorter bill.

I presume, without any question, the Hobbs bill would remedy the situation in your state. Would the Grant bill also?

Mr. DONOHUE: "Provided, That, in any case where

the law of the place where the act or omission occurred has been construed to provide for only punitive damages in the event of wrongful death, the United States shall be liable for such damages."

According to these decisions our courts have construed it not only in the recovery to be punitive, but also [p. 18] compensatory.

Mr. GWYNNE: Any questions? Mr. Lane?

Mr. LANE: No, sir.

Mr. GWYNNE: Thank you, Mr. Donohue.

Are there any other witnesses here urging either one of the bills?

Mr. GOODWIN: Congressman Heselton had to go and he said he would like to be recorded as in favor.

Mr. GWYNNE: Charles R. Clason of Massachusetts was not able to be here, but advises that he is in favor of the legislation and urges its enactment.

Mr. BAYNTON: The Department of Justice would like to offer testimony.

Mr. GWYNNE: Just a moment, please.

Mr. BAYNTON: I am sorry, sir.

Mr. GWYNNE: All right. We will hear you. Give your name to the reporter, please.

STATEMENT OF HAROLD L. BAYNTON, ESQ.
SPECIAL ASSISTANT TO THE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

Mr. BAYNTON: I am Harold L. Baynton, Special Assistant to the Attorney General.

* * * * *

[p. 20] As to the other bills under consideration, H.R. 3668 and H.R. 3690, the Department has felt that it had to move for the dismissal in tort claims for death in the two states about which we have been talking Alabama and Massachusetts.

Mr. WALTER: Why?

Mr. BAYNTON: Because we have felt that the purpose of the tort claims was to compensate those injured, rather than to punish the United States for the wrongdoing of the employee.

Mr. WALTER: After all, you are resorting to a technicality, the effect of which was to deprive a person of the compensation they would have gotten under the laws of the state.

Mr. BAYNTON: That is true.

Mr. WALTER: Do you think it is the duty of the United States to avail itself of all the technical objections that we members of the Bar raise whenever we can?

Mr. BAYNTON: It is a little more than a technicality. You have a mandate from the Congress to allow the United [p. 21] States to be sued under certain circumstances. Would we not be remiss in our duty if we expanded that mandate.

Mr. WALTER: Are you asking me that question? The answer is "No." You owe a duty not only to the United States, but to the citizens of the United States. I do not think that any public official ought to take advantage of technicalities where a person is deprived of something they could get if they were in another forum.

Mr. BAYNTON: That is one of the reasons we think this Act should be amended.

According to the last information I had, there had been three cases in each of the states—three in Alabama and three in Massachusetts. To my knowledge, there has been no final action in any of them. It may be possible that one of the judges has granted a motion. I am not sure.

Of the two bills, we would favor H.R. 3668, the shorter bill, by Mr. Grant.

The punitive damages should be assessed, if the bar

against punitive damages were removed. In the Tort Claims Act it is a punishment, and the two states, by innumerable decisions, have held it to be a punishment to the wrongdoer. The wrongdoer in these accident cases is the Government employee. Other than whatever criminal punishment he may receive in an estate action against him if his act amounted to a crime—other than that, the punishment is imposed on [p. 22] the United States by the payment of money. And we feel that the theory of the Tort Claims Act was not that.

Mr. WALTER: Have appeals been taken in either of those cases?

Mr. BAYNTON: No. I do not believe any of them have been finally decided.

Mr. WALTER: I think the Court went away out of its way to sustain the demurrer, because, after all, it was the intention of the Congress to provide a remedy in accordance with the laws of the state in which the injury or death occurred. I think that was very clear. And for the Court to go on and interpret this punitive thing, which is entirely different, is to deprive a person of a right of action. I think it is very far fetched.

Mr. GRANT: I might say, in the case in Alabama in which Judge McDuffy had it under consideration, he has held it up for several weeks in an attempt to give an opportunity for Congress to amend the Act; and he recently stated that unless something is done pretty soon he would have to dismiss the action.

Mr. GWYNNE: I think there is a great deal in what Mr. Walter says. I feel quite certain that Congress had no intention of writing a law which would bring about the peculiar situation which apparently exists.

Mr. Baynton, do you think the Grant bill would take care [p. 23] of the situation in Alabama and Massachusetts?

Mr. BAYNTON: I am sure it would.

Mr. GOODWIN: You think the Grant bill would, as well as the Hobbs bill?

Mr. BAYNTON: The Hobbs bill goes much further.

Mr. GOODWIN: But you think for Massachusetts the Grant bill would be all right?

Mr. BAYNTON: For both Massachusetts and Alabama.

Mr. GWYNNE: In Iowa we do differentiate between compensatory damages and punitive damages, and, under instructions from the Court, if certain things are found to exist punitive damages may be allowed to punish the wrongdoer.

Mr. BAYNTON: I suppose that is over and above any compensatory damages.

Mr. GWYNNE: That is correct.

The Hobbs bill would permit that to be considered.

Mr. BAYNTON: That is right.

Mr. GWYNNE: You believe that should not be done?

Mr. BAYNTON: I believe so. As I say, the history of the Tort Act grew out of a large number of cases which the Congress had to consider. To my knowledge, I do not believe any private bill included punitive damages at any time. It seems to me the attempt here was to allow the courts to consider the evidence and assess damages on approximately the same basis as Congress had in the past, which did not include [p. 24] punitive damages.

In the large amount of business we apparently lost track of the fact that two states were limited to punitive damages and when the bill became law they were, in effect, cut off.

The Grant bill would allow in those two states where only punitive damages are assessed, claimants against the United States to have their cases decided by the court, which would again put them on somewhat of an equal footing.

Mr. LANE: I would like to ask Mr. Hobbs, if I may,

if, in his opinion, the Grant bill would cover Massachusetts.

Mr. GWYNNE: Mr. Hobbs, would you answer?

Mr. HOBBS: Maybe I can give you the citation, which holds that while those damages which are awardable under the Massachusetts statute are purely punitive, yet they have elements in the nature of compensatory damages to a certain extent, which they delineate. To that extent, which is very minor, the Grant bill would cover Massachusetts. But I think it needs some amendment.

Mr. GOODWIN: Your point, Mr. Hobbs, as I understand it, is that the Grant bill would only cover Massachusetts as to these compensatory elements.

Mr. HOBBS: That is right, because the Grant bill says that where the Supreme Court of the State in question says that only punitive damages may be recovered, yet in one of the Massachusetts cases—the Houlihan case is the leading [p. 25] case—it says categorically that it is punitive damages. But in certain narrow circumstances there might be recovered compensatory damages or damages compensatory in their nature.

Mr. GWYNNE: Does that answer your question, Mr. Lane?

Mr. LANE: Yes.

Mr. GWYNNE: All right, Mr. Baynton. Go ahead.

Mr. BAYNTON: I have nothing more to add, unless I could answer some questions.

Mr. GWYNNE: Do you know of any other difficulties in any other states that have arisen because of differences between the state law and the wording in the Tort Claims Act?

* * * * *

Mr. BAYNTON: * * *

This Alabama-Massachusetts problem and the statute of limitations should properly, I think, be decided by

the courts, and, of course, there is the problem of handling all of these cases.

* * * * *

[p. 26] STATEMENT OF DR. GEORGE B. GALLOWAY, SENIOR SPECIALIST IN LEGISLATIVE ORGANIZATION, LEGISLATIVE RECORD SERVICE

Dr. GALLOWAY: My name is George B. Galloway. I am the Senior Specialist in Legislative Organization at the Legislative Reference Service, and I came this morning at the invitation of the Clerk of the Committee, not expecting to testify.

* * * * *

[p. 29] Dr. GALLOWAY: H. R. 3668 would make the United States liable for punitive damages, as I understand it, and, as previous testimony brought out, this particular amendment is designed to apply to situations that obtain in only two states—Alabama and Massachusetts. It has been suggested to me by Legislative Counsel that the proper solution for the problems that arise in the case of these two states is not to amend the Federal Tort Claims Act, but to change the laws in the two states concerned.

Mr. GWYNNE: We could not do much about that.

Dr. GALLOWAY: You could not do anything about that.

Mr. LANE: And the legislature of Massachusetts would not do it.

Dr. GALLOWAY: That is up to the legislatures of the two states.

Mr. GWYNNE: When they wrote the Tort Claims Act, they did not know the statutes of each of the states.

Dr. GALLOWAY: They sought to deal with the preponderant situation, and they were guided by the situation

as it obtained in 46 out of the 48 states. The proper remedy for the condition in the two states concerned is for them to amend their statutes, rather than amend the Federal statute and thus, perhaps, impair the situation in the other 46 states.

[p. 30] Mr. GOODWIN: Would not the Massachusetts legislature say, "It is Congress that has messed this thing up. Now, let Congress get us out of it"?

Dr. GALLOWAY: That is a policy question and I leave that to your decision. But I would like to add this comment on these bills, that it seems to me that it should be borne in mind what the effect of them will be, if one of these amendments is adopted, upon the Federal Treasury.

I am advised by counsel that the effect would be to take the United States for a ride and give rise to exorbitant demands for punitive damages. In this connection I would like to invite attention to the remarks of Congressman Scrivner, made on the floor of the House on the 2nd of April. Mr. Scrivner's remarks were extended in the record and appear in the Congressional Record for April 2, 1947, on Pages 3093 and 3094.

Mr. Scrivner warned of the development of exorbitant claims for damages against the United States and gave some statistics to support his apprehension.

With reference to H. R. 42, Mr. Chairman—

Mr. WALTER (interposing): Before you go on to that, I would like to ask, is your argument applicable to the Grant bill?

Dr. GALLOWAY: Well, I think it is applicable to both of these bills, in so far as they would, as I understand them, [p. 31] make the United States liable for punitive damages.

Mr. GWYNNE: The Grant bill would hardly do that in my state.

Mr. WALTER: It would only do it in two states.

Mr. GWYNNE: It imposes in Massachusetts and Alabama the same duties on the United States as it does on an individual in Massachusetts or Alabama.

Dr. GALLOWAY: I ought not to testify on that, not being a lawyer. I received this advice from Legislative Counsel who drew the Federal Tort Claims Act.

If I may now address my remarks to H. R. 42——

Mr. HOBBS (interposing): Mr. Chairman, may I say this: The records show that Massachusetts and Alabama are among six average award states in the nation; much less than the ones who award compensatory damages strictly. And, of course, we are not interested in the Celler bill.

* * * * *

[p. 32] Dr. GALLOWAY: That is correct. It was no part of the thought of the Joint Committee that the Federal Tort Claims Act would discriminate against any state.

Mr. LANE: In other words, it was never brought to the attention of the Select Committee and they had no idea at that time that this ever would happen.

Dr. GALLOWAY: That is correct.

Mr. WALTER: Is there a limitation of the amount that can be recovered in Massachusetts, of $10,000.

Mr. LANE: Yes.

* * * * *

[p. 34] STATEMENT OF WILLIAM L. ELLIS, ESQ., ASSISTANT TO THE COMPTROLLER GENERAL

Mr. ELLIS: My name is W. L. Ellis, Assistant to the Comptroller General.

[p. 35] I have with me Mr. O. K. Blanchard, of the General Accounting Office.

We are here in response to the invitation of the Chairman of the Judiciary Committee in a letter received

day before yesterday, asking for someone to express the official views of the General Accounting Office. Those views can be expressed very briefly.

I have a memorandum prepared in the General Counsel's Office, which was reviewed carefully by the Comptroller General this morning and has his approval.

* * * * *

[p. 36] On H. R. 3668 and H. R. 3690, there seems to be no question but that an inequity has been proved with respect to the two states, and some action would be indicated to correct it in line with the general principle of the Tort Claims Act.

There is, however, a suggested criticism, that the approach in each case is subject to improvement, in this way: The first bill, H. R. 3668, allows punitive damages in those two states. The net result, it is suggested, is not to remove an inequity, but to continue an inequity, because it allows a different rule of law there than in the other 46 states.

The second bill corrects the situation by allowing punitive damages in all states. That is criticizable because there is no maximum limit in the Tort Claims Act, and it is thought to be, perhaps, an unjust burden on the taxpayers and the Treasury to charge them for punitive damages, in the sense that what the legislation was intended to do, as we understood it, was to carry out the policy which Congress had followed, namely, to compensate people who have been damaged by the Government's wrongdoing.

As a suggested amendment to H. R. 3668, we would offer this solution, namely, correct the inequity by removing the inequity. That is to say, do it in this way: Since in those two states compensatory damages are not allowed, all [p. 37] that is required is to amend the Federal Tort Claims Act to say that in such states compensatory damages shall be allowed.

Mr. GWYNNE: You have a suggested amendment?

Mr. ELLIS: Yes.

"Provided, that in any case where the law of the place where the act or omission occurred provides, or has been construed to provide, for only punitive damages in the event of wrongful death, the United States shall be liable for actual or compensatory damages in lieu thereof."

It is believed that that suggestion would eliminate the discrepancy and would make the settlement of claims in those two states to be exactly in accord with the general rules followed in the other 46 states, so far as we are in a position to understand.

Mr. LANE: The United States would not be liable to the same extent as other individuals in Massachusetts and Alabama, would it?

Mr. ELLIS: That is true; but that is true in the rest of the states also.

Mr. BLANCHARD: It would give Massachusetts and Alabama the same situation as now exists in other states.

Mr. ELLIS: That is correct.

Mr. WALTER: It is important; because when a jury thinks of a defendant as being the rich Uncle Sam there might be a strong temptation, if there is no limit or measure, to render [p. 38] a judgment in a much larger amount.

Mr. ELLIS: I believe there are no juries allowed in these cases.

Mr. WALTER: That is right.

Mr. ELLIS: But there is this element to consider with respect to juries: The judge is guided, in general, by the recovery otherwise allowed by juries, and you would have that problem anyway.

* * * * *

STATEMENT OF CAPTAIN CHESTER WARD, OFFICE OF THE JUDGE ADVOCATE GENERAL ON THE NAVY DEPARTMENT

Captain WARD: Mr. Chairman and members of the Committee: My name is Chester Ward. I am from the Office of the Judge Advocate General of the Navy Department.

* * * * * * *

[p. 40] Captain WARD: Although the Navy Department opposes both H. R. 3668 and H. R. 3690, I do not believe it would oppose the proposed change as suggested by the representative of the General Accounting Office. Our views on these two bills are exactly the same as those expressed by him—that is, we can see no reason, so far as the principle of the Tort Claims Act is concerned, to subject the United States to punitive damages throughout the entire country.

Mr. GWYNNE: In other words, your view is that actual damages should be paid in every state, and punitive damages should be paid in no state.

Captain WARD: That is it exactly, sir. And the Navy Department is gravely concerned by reason of the number of suits and the amount of money involved, which have already been filed under the Tort Claims Act. Over three million dollars of claims have already been filed with the Navy Department, and both of these bills would permit the amendment of actions already brought to include punitive damage elements. So the drain on the Treasury would be greatly increased if that were done.

Actually, the average amount of the suits now pending is over $23,000, and we would consider it very unfortunate if the amount would be raised further to include punitive damages.

I would like to state, in addition to anything that has [p. 41] been said so far, that, so far as punishment of the actual wrongdoer is concerned, nothing in the Act passed by Congress has immunized the actual wrongdoer from punitive damages even in these two states, regardless of the Tort Claims Act. If the plaintiff or the claimant wanted to punish the wrongdoer, he could go after him personally and nothing in this Act would protect him even in Massachusetts or Alabama. And it is considered very doubtful whether the United States should be subjected to punishment when the malicious or wanton character of the act is not properly chargeable to the United States.

Mr. LANE: I do not suppose a claimant would get very far in suing one of these enlisted men who was driving one of those trucks.

Captain WARD: You would have a local jury.

Mr. WAITE: He would get just as much from him as if he were driving a truck for the ABC Corporation.

Mr. LANE: But the ABC Corporation is insured under the Compulsory Insurance Act.

* * * * *

[p. 43] Mr. BAYSON: You feel that the approach by the representative of the General Accounting Office is the proper one?

Captain WARD: It is a very just and workable way of getting around it.

Mr. BAYSON: We want to do right by Alabama and Massachusetts, but we do not want to give them a privileged status over the other states.

Captain WARD: That is our attitude exactly.

Mr. GWYNNE: Thank you very much.

With the exception of statements that have been referred to and which are to be filed, the hearings will be closed.